RECORD, CASE No. 14,047.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 112

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE MARINE INSURANCE COMPANY OF LONDON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Marine Insurance Company of London *vs.* The St. Louis, Iron Mountain & Southern Railway Company, a manifest error hath happened, to the great damage of the said defendant, St. Louis, Iron Mountain & Southern Railway Company, as by it complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States ought to be done.

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of March, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 114th.

RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Western Division, Eastern District of Arkansas,
By W. P. FEILD, *D. C.*

Allowed by—
HENRY C. CALDWELL,
District Judge.

Service of copy acknowledged March 8, 1890.
U. M. ROSE,
G. B. ROSE,
For Def't in Error.

The execution of the foregoing writ of error appears from the schedule hereto attached.

2 Be it remembered that on the 8th day of October, 1888, came into the office of the clerk of the circuit court of the United States for the western division of the eastern district of Arkansas the Marine Insurance Company of London, by Sanders

and Watkins, Esqrs., its attorneys, and filed therein its complaint against the St. Louis, Iron Mountain and Southern Railway Company *et al.*, which complaint is as follows:

In the U. S. Circuit Court, Western Division of the Eastern District of Arkansas.

THE MARINE INSURANCE COMPANY OF LONDON
v.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY and THE UNION COMPRESS COMPANY OF LITTLE ROCK.

3 The plaintiff is a corporation under the laws of England and is a citizen of England; therefore an alien.

The defendants are both corporations under the laws of Arkansas and are citizens of said State and have their principal place of business or office in the western division of the eastern district of Arkansas, and the amount in controversy in each of the two causes of action in this suit exceeds the sum of two thousand dollars, exclusive of interest and cost.

The plaintiff, for cause of action against the defendants, states:

The St. Louis, Iron Mountain and Southern Railway Company is the owner of a railway line which has for one of its connectional points the city of Little Rock, and at said city it receives large quantities of cotton in the bale.

4 That the other defendant, The Union Compress Company, is a corporation organized for the purpose, among other things, of compressing cotton at said city of Little Rock, Arkansas.

That the said Union Compress Company on the 14th day of November, 1887, was and for a long time previous thereto had been the owner of a certain shed and grounds situate contiguous to the right of way and grounds of the said railway company in the city of Little Rock.

That the said shed and grounds were used and occupied jointly by the said railroad company and the Union Compress Company as a receiving depot and place of deposit for cotton in the bale delivered for shipment on said railway line; that the defendants acted in concert and jointly in receiving, compressing, and shipping the cotton so delivered and received at said point.

5 That by agreement between the said railway company and the said compress company it was the duty of the railroad company to promptly furnish cars and transportation facilities for the removal of the cotton so received at said point to the grounds and compress building of the compress company, some distance away, in order that the same might be compressed and made ready for shipment on said railway line.

That prior to the said 14th day of November, 1887, the said compress and railway companies had received and deposited a large quantity of cotton, amounting to several thousand bales, at said point and had filled up the said shed and the grounds so surround-

ing the same; that said shed and grounds were located at and near the northern terminus of Main street, in the city of Little Rock, and in a prominent and central portion of the business part of
6 said city, where the accumulation and continuance of inflam-able material would come in dangerous contact with and be exposed to the risk and hazard of fire from numerous sources such as attend city thoroughfares and the careless conduct of negligent parties passing and repassing and dropping fire from lighted matches, cigars, cigarettes, pipes, and like dangerous agencies; that not only was the risk from such an undue accumulation of inflam-'able material increased by said dangers and exposures, but the said cotton was carelessly and negligently deposited and permitted to remain for a long period of time within a few feet of the track of said railway, where its steam-engines were passing constantly and emitting sparks, which could hardly fail to set on fire the said cotton and consume the whole number of bales thereof and the
7 shed, with all the buildings surrounding; that the season then and for a long while previous thereto had been dry, and all substances and fabrics such as cotton were in a highly inflam-'able condition; that notwithstanding all this the said railway company and compress company continued to collect large quantities of cotton which was highly inflam-able and to deposit the same on said grounds, and the said railway company for a long period of time carelessly and negligently refused and failed to furnish the necessary cars and facilities to transport the said cotton to the compress building in order that the same might be compressed and shipped, and the said Union Compress Company carelessly and negligently refused and failed to provide any appliances suitable for the extinguishment of fire should the same occur, and the said railroad company carelessly and negligently continued to run
8 & 9 their said locomotive engines in close and dangerous proximity to said cotton, and the said railroad company and compress company carelessly and negligently failed to provide any covering or protection for said cotton from the sparks from said engines, and on account of the gross and wanton negligence of the said defendants so above recited the said cotton caught on fire on the 14th day of November, 1887, and a large amount of cotton and property was consumed.

Plaintiff states that among the bales of cotton so received by the said compress company for compressing and shipment on said railroad were ninety-three (93) bales delivered to them by R. E. Douglass & Co., cotton merchants, of Little Rock, Arkansas, which
10 were entirely consumed by fire; that the plaintiff is an insurance company and had issued to the said R. E. Douglass & Co. a policy of insurance on said cotton, insuring the same against loss by fire; that by reason of the destruction of the said cotton the plaintiff, as was its duty, paid to the said R. E. Douglass & Co. the full amount of said policy, to wit, the sum of three thousand nine hundred and ninety dollars and forty-seven cents (3,990.47), the same being the value of the said cotton; that plaintiff is subrogated by law to the claim and demand of the said R. E. Douglass & Co.

for the loss of said cotton, and, by reason of the gross carelessless and negligence of the said defendants, the plaintiff was and is damaged in the sum of three thousand nine hundred and ninety and forty-seven hundredths dollars.

Second cause of action.

11 The plaintiff, for a second cause of action against the defendants, states: The St. Louis, Iron Mountain and Southern Railway Company is the owner of a railway line which has for one of its connectional points the city of Little Rock, and at said city it receives large quantities of cotton in the bale; that the other defendant, The Union Compress Company, is a corporation organized for the purpose, among other things, of compressing cotton at said city of Little Rock, Arkansas; that the said Union Compress Company on the 14th day of November, 1887, as and for a long time previous thereto, had been the owner of a certain shed and grounds situate contiguous to the right of way and grounds of the said railway company in the city of Little Rock.

That the said shed and grounds were used and occupied jointly by the said railroad company and the Union Compress Com-
12 pany as a receiving depot and place of deposit for cotton in the bale delivered for shipment on said railway line; that the defendants acted in concert and jointly in receiving, compressing, and shipping the cotton so delivered and received at said point; that by agreement between the said railroad company and the said compress company it was the duty of the railroad company to promptly furnish cars and transportation facilities for the removal of the cotton so received at said point to the grounds and compress buildings of the compress company, some distance away, in order that the same might be compressed and made ready for shipment on said railway line.

That prior to the said 14th day of November, 1887, the said compress and railway companies had received and deposited a large quantity of cotton, amounting to several thousand bales, at said point and had filled up the said shed and the grounds so surrounding the same.

13 That said shed and grounds were located at or near the northern terminus of Main street, in the city of Little Rock, and in a prominent and central portion of the business part of said city, where the accumulation and continuance of inflam-able material would come in dangerous contact with and be exposed to the risk and hazard of fire from numerous sources such as attend city thoroughfares and the careless conduct *and* negligent parties passing and repassing and dropping fire from lighted cigars, matches, cigarettes, pipes, and like dangerous agencies; that not only was the risk from such an undue accumulation of inflam-able material increased by said dangers and exposures, but the said cotton was carelessly and negligently deposited and permitted to remain for a longer period of time within a few feet of the track of said
14 railway, where its steam-engines were passing constantly and emitting sparks, which could hardly fail to set on fire the

said cotton and consume the whole number of bales thereon and the shed, with all the buildings surrounding; that the season then and for a long time previous thereto had been dry, and all substances and fabrics such as cotton were in a highly inflam-able condition; that notwithstanding all this the said railway company and compress company continued to collect large quantities of cotton which was highly inflam-able and to deposit the same on said grounds, and the said railway company for a long period of time carelessly and negligently refused and failed to furnish the necessary care and facilities to transport the said cotton to the compress building in order that the same might be compressed and shipped, and the said Union Compress Company carelessly and negligently refused and failed to provide any appliances suitable for the
15 extinguishment of fire should the same occur, and the said railroad company carelessly and negligently continued to run their said locomotives engines in close and dangerous proximity to said cotton, and the said railroad company and compress company carelessly and negligently failed to provide any covering or protection for said cotton from the sparks from said engines, and on account of the gross and wanton negligence of the said defendants so above recited the said cotton caught on fire on the 14th day of November, 1887, and a large amount of cotton and property was consumed.

Plaintiff states that among the bales of cotton so received by the said compress company for compressing and shipment on said railroad were one hundred and sixty-five (165) bales delivered to them by Howell Cotton Company, cotton merchants, of Little Rock, Arkansas, which was entirely consumed by said fire; that the
16 plaintiff is an insurance company and had issued to the said Howell Cotton Company a policy of insurance on said cotton, insuring the same against loss by fire.

That by reason of the destruction of the said cotton the plaintiff, as was its duty, paid to the said Howell Cotton Company the full amount of said policy, to wit, the sum of seven thousand nine hundred and seventy-one dollars (7,971.00), this sum being the value of said cotton; that plaintiff is subrogated by law to the claim and demand of the said Howell Cotton Company for the loss of said cotton, and, by reason of the gross carelessness and negligence of the said defendants, the plaintiff was and is damaged in the sum of seven thousand nine hundred and seventy-one dollars.

Wherefore plaintiff prays judgment for the two sums of
17 money above named, aggregating eleven thousand nine hundred and sixty-one dollars and forty-seven cents (11,961.47), with interest thereon from the 1st day of January, 1888, and for all other proper relief.

SANDERS & WATKINS,
For Plaintiff.

STATE OF ARKANSAS, }
County of Pulaski. }

Geo. H. Sanders, being duly sworn, says that he is the attorney of the plaintiffs in the above action; that they reside in the city of London, England, and are now absent from this county and State, and that the facts set forth in the foregoing complaint are true to the best of his knowledge and belief.

GEO. H. SANDERS.

Subscribed and sworn to before me this 8th day of October, 1888.

RALPH L. GOODRICH, *Clerk*,
By W. P. FEILD, *D. C.*

18 We undertake and are bound for costs in the above action.

SANDERS AND WATKINS.

Filed and writ issued Oct. 8, 1888.

RALPH L. GOODRICH, *Clerk*,
By W. P. FEILD, *D. C.*

19 United States of America, Western Division of the Eastern District of Arkansas.

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 28th day of October, anno Domini one thousand eight hundred and eighty-nine, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on November 11, 1889:

THE MARINE INSURANCE COMPANY OF LONDON
v.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY. }

Comes the plaintiff, by Sanders and Watkins and U. M. & G. B. Rose, Esqrs., its attorneys, and by leave of the court files herein its amended and supplemental complaint.

20 Which amended and supplemental complaint is as follows:

The plaintiff herein is a citizen of England; therefore, an alien. The defendant is a corporation of the State of Arkansas and has its principal office and place of business in the eastern district of Arkansas, and the amount in controversy in the two causes of action herein set out exceeds the sum of two thousand dollars, exclusive of interest and costs.

For cause of action plaintiff states that prior to the 20th day of September, 1887, the Union Compress Company was engaged in compressing bales of cotton for transportation; that their compress was situated in the town of Argenta, on the north side of the Arkan-

sas river, opposite the city of Little Rock, in said district; that
21 the defendant was a common carrier using and operating a railway running from the city of Little Rock to Argenta, over a bridge that was owned or used by it, to Argenta; that prior to that time said defendant had agreed with said compress company, in consideration of a certain sum of money to be paid to it by said compress company for each and every car-load of cotton to be transported by it under said agreement, that the said defendant would receive all the cotton in bales that might be brought to the sheds of said compress company in said city, and that it would transport the same from there to said compress in Argenta, a distance of about a mile; that said sheds referred to in said contract were wooden sheds built at the intersection of Main and Water streets, in said city, each of said streets being forty feet wide
22 and crossing each other at right angles, Main street running north and south and Water street running east and west, both of said streets being public thoroughfares perpetually dedicated to the public use; that immediately in front of said sheds on Water streets there was a main railway track of said defendant on which cars were propelled in transporting said cotton to said compress under said contract and which was also much used for other purposes; that immediately in front of said sheds and connected therewith was a platform between said sheds and said railway track which was habitually used for the purpose of loading said cotton on said cars for transportation as aforesaid; that at the time the cotton hereinafter particularly mentioned was deposited in said sheds the said contract had been habitually acted on by the parties thereto for a long period of time; that for
23 the purpose of realizing and increasing the compensation thus agreed upon said defendant made the said sheds a receiving station of its road for all cotton in common or uncompressed bales that might be delivered there, and gave bills of lading for the same to all persons depositing cotton in said sheds and applying therefor to any point in the United States or in Europe to which it might be consigned, reserving in said bills of lading the privilege of having the same compressed; that while said contract was in full force R. E. Douglas & Co. placed in said sheds ninety-three (93) bales of cotton, which were uncompressed, in the care and custody of said compress company, with a view to its future compression and shipment in accordance with the terms of said agreement, which had been so long acted on as to become a custom
24 well known to all persons handling and shipping cotton in Little Rock, the said ninety-three bales being then and there of the value of three thousand nine hundred and ninety dollars and forty-seven cents (3,990.47), and that while it was thus deposited the plaintiffs issued a policy of insurance on it in favor of the owner thereof, said plaintiffs insuring them against any loss that they might sustain by reason of damages or destruction thereof by fire for a period extending beyond the time that the cotton was actually destroyed, as will be hereinafter set forth, said policy covering the entire value of said cotton; that under said agreement

and custom, by virtue of which cotton was habitually received at said sheds, very large quantities of it were annually deposited at said sheds for compression and transportation by many owners; that said sheds were not sufficiently large
25 to hold all the cotton that was annually brought there for said purpose in the months of October and November beyond more than two or three days, there being no need for any additional space in case said defendant should expeditiously remove said cotton as it was received, as it was required by its said contract and its obligations to the public to do, said sheds not having been designed for the keeping of cotton for any great length of time or in large quantities, but only being intended in the main for the temporary protection of cotton until such time as would suffice for its removal to said compress, said sheds being made of wood and placed within a few feet of said railway track on which the engines of defendant were passing at all hours of the day and night, the said sheds being open in front looking towards Water street, so that cotton de-
26 posited there was considerably exposed to the risk of damage or destruction by fire occasioned by sparks emitted from passing engines and from other causes; that in the months of October and November, 1887, said defendant did not remove the cotton that was received at said sheds within a reasonable time, as it was required by its said contract and by the custom which had grown up thereunder, but suffered it unreasonably to accumulate at said sheds from time to time during said period, and that, although during that time the defendant was requested by said compress company to remove it from said sheds where it was exposed to special hazard, which was daily increased from fresh accumulations, the weather being at that time unusually dry, said defendant neglected and refused so to do, and though large quantities of cotton were daily received at said sheds from the 20th day of October until the 14th day of November, 1887,
27 the defendant did not during that period remove a single bale of cotton from said sheds; that in the meantime said sheds became filled with said cotton to overflowing, and, there being no other place where additional receipts could be stored, large quantities of cotton bales were placed on Main street, adjoining said sheds, and that at that time there were buildings at the intersection of said streets on both sides thereof—one of them on the south side of Water street and the west side of Main street and adjoining both streets—forming the said cotton sheds of the said compress company, the same being contiguous to both of said streets; that by reason of the reception of said cotton by said defendant at that place and its failure to remove it, it having by reason of its invitation to the public to deliver cotton for shipment at that place on the faith that it would be removed within a reasonable
28 time, cotton in bales continued to be delivered there and to be received by defendant, which continued daily to give out bills of lading therefor until it encroached on said adjoining streets, and for more than two weeks, with the knowledge and consent of defendant, it was piled clear across Main street, from side to side,

from eight to ten feet high, leaving only a passage for foot passengers about four feet wide, all the rest of said street being rendered impassable by said cotton, of which cotton about 4,000 bales were covered with bills of lading issued by said defendant and which had been long previously received by it, and that said cotton had thus remained on said street for about three weeks next before the loss hereinafter to be mentioned and much of it for a still longer period of time, the same constituting a public nuisance, infringing on the rights of the public to the free and unimpeded use of said street, and
29 endangering the cotton of the said Douglas & Co. deposited as aforesaid, as well as much other valuable property in the vicinity, and indirectly a large part of the most valuable public and private buildings in said city, and that while said defendant was thus continuing said nuisance, which was made a criminal offence by an ordinance of said city, to which attention had been but recently called by the mayor thereof in a public proclamation, and when there were about 4,000 bales of said cotton thus heaped in said sheds and in said street which defendant should long previously have removed, said cotton was fired in said street either by sparks negligently dropped from defendant's engines or by some one to the plaintiff unknown, either wilfully or negligently, but most likely through negligence, as persons were continually
30 traversing said street and going between said bales of cotton smoking pipes, cigars, and cigarettes, and said fire first originated at or near said narrow passage on Main street, between said bales of cotton, and in broad daylight; that by reason of said fire the said cotton of said Douglas & Co. was totally burned and destroyed within the risk insured against in said policies, the total value thereof being covered by the same, and that thereupon said Douglas & Co. afterwards made proof of the loss of said cotton, upon which the plaintiffs paid him the full amount thereof.

II. And for a different statement of the same cause of action stated in the first paragraph herein said plaintiffs say that prior to the 14th day of November, 1887, R. E. Douglas & Co. had deposited in the sheds of the Union Compress Company, in the city of Little Rock, ninety-three (93) bales of cotton, of the value of
31 $3,990.47, and that while they were thus deposited plaintiff, on the application of said Douglas & Co., insured them against loss by fire for their full value; that from the 20th of October until the 14th day of November, 1887, said defendant and the said Union Compress Company by their joint act caused many other bales of cotton to be piled in the public street of said city adjoining said cotton sheds so as to greatly obstruct the public use of said street and so create a public nuisance, which was continued for three weeks or more until the said 14th day of November, 1887, when said cotton in said street was fired either by sparks negligently dropped from defendant's passing engines or otherwise by some person unknown to the plaintiffs, and that said fire was communicated to said sheds and destroyed the same, together with said cotton of said Douglas & Co. deposited therein, and that, as said loss of said
32 cotton was within the risk of said policy, said Douglas &

Co. proved up said loss, and the plaintiffs paid him the same, amounting to —— dollars, on the 8th day of January, 1888.

III. And for a further and distinct cause of action said plaintiff says that prior to the 20th day of September, 1887, the Union Compress Company was engaged in compressing bales of cotton for transportation; that their compress was situated in the town of Argenta, on the north side of the Arkansas river, opposite the city of Little Rock, in said district; that the defendant was a common carrier using and operating a railway running from the city of Little Rock to Argenta over a bridge that was owned or used by it to Argenta; that prior to that time said defendant had agreed with said compress company, in consideration of a certain sum of money to be
33 paid to it by said compress company for each and every carload of cotton to be transported by it under said agreement, that the said defendant would receive all the cotton in bales that might be brought to the sheds of said compress company in said city, and that it would transport the same thence to said compress in Argenta, a distance of about a mile; that said sheds referred to in said contract were wooden sheds, built at the intersection of Main and Water streets, in said city, each of said streets being forty feet wide and crossing each other at right angles, Main street running north and south and Water street running east and west, both of said streets being public thoroughfares, perpetually dedicated to the public use: that immediately in front of said sheds and connected therewith was a platform between said sheds and said
34 railway track, which was habitually used for the purpose of loading said cotton on said cars for transportation as aforesaid; that at the time the cotton hereinafter particularly mentioned was deposited in said sheds the said contract had been habitually acted on by the parties thereto for a long period of time; that for the purpose of realizing and increasing the compensation thus agreed upon said defendant made the said sheds a receiving station of its road for all cotton in common or uncompressed bales that might be delivered then and gave bills of lading for the same to all persons depositing cotton in said sheds and applying therefor to any point in the United States or in Europe to which it might be consigned, reserving in said bills of lading the privilege of having the same compressed; that while said contract was in full force the Howell Cotton Company placed in
35 said sheds one hundred and sixty-five (165) bales of cotton which was uncompressed in the care and custody of said compress company, with a view to its future compression and shipment, in accordance with the terms of said agreement, which had been so long acted on as to become a custom well known to all persons handling and shipping cotton in Little Rock, the said one hundred and sixty-five (165) bales being then and there of the value of seven thousand nine hundred and seventy-one dollars (7,971.00), and that while it was thus deposited the plaintiffs issued a policy of insurance on it in favor of the owner thereof, each of said plaintiffs insuring them against any loss that they or either of them might sustain by

reason of damages or destruction thereof by fire for a period
36 extending beyond the time that the cotton was actually destroyed, as will be hereinafter set forth, said policies covering the entire value of said cotton; that under said agreement and custom by virtue of which cotton was habitually received at said sheds very large quantities of it were annually deposited at said sheds for compression and transportation by many owners; that said sheds were not sufficiently large to hold all the cotton that was annually brought there for said purpose in the months of October and November beyond more than two or three days, there being no need for any additional space in case said defendant should expeditiously remove said cotton as it was received, as it was required by its said contract and its obligation to the public to do, said sheds not having been designed for the keeping of cotton for any great length of time or in large quantities, but only being intended in the main for the temporary
37 protection of cotton until such time as would suffice for its removal to said compress, said sheds being made of wood and placed within a few feet of said railway track, on which the engines of the defendant were passing at all hours of the day and night, the said sheds being also open in front looking towards Water street, so that cotton deposited there was considerably exposed to the risk of damage or destruction by fire, occasioned by sparks emitted from passing engines and from other causes; that in the months of October and November, 1887, said defendant did not remove the cotton that was received at said sheds within a reasonable time, as it was required by its said contract and by the custom which had grown up thereunder, but suffered it unreasonably to ac-
38 cumulate at said sheds from time to time during said period, and that although during that time the defendant was requested by the said compress company to remove it from said sheds, where it was exposed to special hazard, which was daily increased from daily accumulations, the weather being at that time unusually dry, said defendant neglected and refused to do so, and though large quantities of cotton were daily received at said sheds from the 20th day of October until the 14th day of November, 1887, the defendants did not during that period remove a single bale of said cotton from said sheds; that in the meantime said sheds became filled with said cotton to overflowing, and, there being no place where additional receipts could be stored, large quantities of cotton bales were placed on Main street adjoining said sheds, and that at that time there were buildings at the intersection of said streets on both sides thereof, one of them on the
39 south side of Water street and the west side of Main street and adjoining both streets, forming the said cotton sheds of the said compress company, the same being contiguous to both of said streets; that by reason of the reception of said cotton by said defendant at that place and its failure to remove it, it having by reason of its invitation to the public to deliver cotton for shipment at that place on the faith that it would be removed within a reasonable time, cotton in bales continued daily to be delivered there and to be

received by defendant, which continued to give out bills of lading therefrom, until it encroached on said adjoining streets, and for more than two weeks with the knowledge and consent of defendant it was piled clear across Main street, from side to side, from eight to ten feet high, leaving only a passage for foot passengers about
40 four feet wide, all the rest of said street being rendered impassable by said cotton, of which cotton about 4,000 bales were covered with bills of lading issued by said defendant, and which had been long previously received by it, and that said cotton had thus remained on said street for about three weeks next before the loss hereinafter to be mentioned, and much of it for a still longer period of time, the same constituting a public nuisance, infringing on the rights of the public to the free and unimpeded use of said street, and endangering the cotton of said Howell Cotton Company deposited as aforesaid, as well as much other valuable property in the vicinity, and indirectly a large part of the most valuable public and private buildings in said city, and that while said defendant was thus continuing said nuisance, which was made a criminal offense by an ordinance of said city, to which attention had been but recently
41 called by the mayor thereof in a public proclamation, and when there were about 4,000 bales of said cotton thus heaped in said sheds and in said street, which defendant should long previously have removed, said cotton was fired in said street either by sparks negligently dropped from defendant's engines or by some one to the plaintiff unknown, either wilfully or negligently, but most likely through negligence, as persons were continually traversing said street and going between said bales of cotton, smoking pipes, cigars, and cigarettes, and said fire first originated at or near said narrow passage on Main street between said bales of cotton, and in broad daylight; that by reason of said fire the said cotton of said Howell Cotton Company was totally burned and destroyed within the risk insured against in said policies, the total value thereof
42 being covered by the same, and that thereupon said Howell Cotton Company afterwards made proof of the loss of said cotton, upon which the plaintiffs paid them in full the amount thereof.

IV. And for a different statement of the same cause of action set forth in the third paragraph herein said plaintiffs say that prior to the 14th day of November, 1887, the Howell Cotton Company had deposited in the sheds of the Union Compress Company, in the city of Little Rock, one hundred and sixty-five (165) bales of cotton, of the value of seven thousand nine hundred and seventy-one (7,971.00) dollars, and that while they were thus deposited plaintiff, on the application of said Howell Cotton Company, insured them against loss by fire for their full value; that from the 20th day of October until the 14th day of November, 1887, said defendant and the Union Compress Company, by their joint act, caused many other
43 bales of cotton to be piled in the public street of said city adjoining said cotton sheds, so as to greatly obstruct the public use of said street, and so created a public nuisance, which was continued for three weeks or more, until the said 14th day of No-

vember, 1887, when said cotton in said street was fired either by sparks negligently dropped from defendant's passing engines or accidentally or otherwise by some person unknown to the plaintiffs, and that said fire was communicated to said sheds and destroyed the same, together with said cotton of said Howell Cotton Company deposited therein, and that as said loss of said cotton was within the risk of said policy said Howell Cotton Company proved up said loss and the plaintiffs paid them the same, amounting to — dollars, on the 8th day of January, 1888.

Wherefore plaintiffs pray that they have judgment against
44 said defendant for said sum of money so paid by them as aforesaid, with interest and costs.

SANDERS & WATKINS,
U. M. & G. B. ROSE,
For Plaintiff.

Filed Nov. 11, 1889.

RALPH L. GOODRICH, *Clerk.*

And on January 11, 1890, as follows:

Comes the defendant, by Dodge and Johnson, Esqrs., its attorneys, and files herein its demurrer to the complaint, its plea of non-joinder, and its motion to make the complaint more specific.

Which demurrer is as follows:

I. For demurrer to the 1st and 2d counts respectively of plaintiff's amended and supplemental complaint defendant says:

1st. That there is a defect of parties plaintiff in this, that
45 the assured, under whom plaintiff claims its rights, are not made parties hereto.

2d. That neither of said counts state facts sufficient to constitute a cause of action in favor of plaintiff and against this defendant.

II. And for demurrer to the 3d and 4th counts of said complaint defendant says:

1st. That there is a defect of parties plaintiff in this, that the assured, under whom plaintiff claims its rights, are not made parties thereto.

2d. That neither of said counts state facts sufficient to constitute a cause of action in favor of plaintiff against this defendant.

III. And, further demurring to the whole of said complaint and to each and every count thereof for cause of demurrer, defendant says that the said several causes of action are not and neither of them is assignable by the statute of this State, and plain-
46 tiff is not entitled to maintain said action in its own name.

J. M. MOORE &
DODGE & JOHNSON,
Att'ys for Defendant.

Filed January 11, 1890.

RALPH L. GOODRICH, *Clerk.*

Which plea of non-joinder is as follows:

I. Comes the defendant and for special plea to the 1st and 2d counts of the amended and substituted complaint herein says that

R. E. Douglass & Co., to whom the policy of insurance referred to in said counts was issued by plaintiff, are necessary parties to this action and are not joined therein.

II. And for special plea to the 3d and 4th counts defendant says that the Howell Cotton Company, to whom the policy of in-
47 surance referred to in said counts was issued, are necessary parties to this action, and the same are not joined therein.

Wherefore defendant prays that plaintiff be required to make the said R. E. Douglass & Co. and the Howell Cotton Company parties to this action, or in default thereof that this cause be dismissed.

J. M. MOORE &
DODGE & JOHNSON,
Att'ys for Defendant.

Filed January 11, 1890.

RALPH L. GOODRICH, *Clerk.*

Which motion to make complaint more definite is as follows:

Comes the defendant and moves the court for an order compelling the plaintiff to make its complaint more specific, in this:

That it set out more specifically the terms of the two several
48 policies of insurance referred to and file with said complaint said original policies under which it claims its right to recover, and upon its failure to do so defendant asks that this cause be dismissed.

Filed Jan'y 11, 1890.

RALPH L. GOODRICH, *Clerk.*

And on January 27, 1890:

Comes the plaintiff, by Sanders and Watkins and U. M. & G. B. Rose, Esqrs., its attorneys, and comes the defendant, by Dodge and Johnson and J. M. Moore, Esqrs., its attorneys, and the parties proceed to the argument on the demurrer to the complaint, the plea of non-joinder, and the motion to make the complaint more specific, and, the argument not being concluded, the same is continued.

49 And on January 30, 1890, as follows:

Comes the plaintiff, by Sanders and Watkins and U. M. & G. B. Rose, Esqrs., its attorneys, and comes the defendant, by Dodge and Johnson and J. M. Moore, Esqrs., its attorneys, and the court, having heard all the argument of counsel and being now well and sufficiently advised in the premises, considers that the demurrer to the complaint, the plea of non-joinder of proper parties, and the motion to make the complaint more specific be overruled; to which rulings of the court the defendant now excepts.

And on February 3, 1890, as follows:

Comes the defendant, by Dodge and Johnson, Esqrs., its attorneys, and files herein its answer to substituted complaint.

Which answer is as follows:

50 I. For answer to 1st count of plaintiff's complaint defendant says:

It admits that prior to September 20, 1887, the Union Compress Company was engaged in compressing cotton for transportation at Little Rock, Arkansas. It denies that its only compress was situated at the town of Argenta, Arkansas, but says that said Union Compress Company had its compress buildings located for many years at the foot of Main street, in the city of Little Rock, Arkansas, and had been engaged up to within a short period prior to the said 20th day of September, 1887, in compressing cotton at said foot of Main street, and at the date above referred to was receiving cotton at said point in its compress building, warehouses, and sheds for the purpose of compressing the same.

It says further that the said Union Compress Company, on said date, was erecting a new compress in the eastern portion of
51 the city of Little Rock, which at that time was not quite ready to receive cotton for compression.

It admits that its line of railroad ran alongside of the said compress and warehouses belonging to the said Union Compress Company, situated in the city of Little Rock and at the foot of Main street; but it denies that it ever made any contract with the said Union Compress Company by which it agreed or held out any inducement to the said compress company or the public to receive cotton at its compress and warehouses at the foot of Main street, in the city of Little Rock, or anywhere else; but it says it gave the said Union Compress Company a certain rate per car-load, whereby it agreed to haul all of the cotton of the said compress company from its compress and warehouses and sheds at the foot of Main street and elsewhere, in the city of Little Rock, to its compress in Argenta whenever it should desire to transfer cotton
52 from one place to the other.

Defendant says that for many years a compress and warehouses had been erected at the foot of Main street, in the city of Little Rock, by individual enterprise, and that the said compress and warehouses were built alongside of its tracks long after said tracks were constructed and in operation, but it denies that it had any part in the erection or control of the said compress buildings, warehouses, or sheds at the foot of Main street, either before or at the time of the fire referred to in the complaint, and it denies that, for the purpose of realizing more and increasing the profits by hauling cotton from the said foot of Main street, it made the said Union Compress Company buildings and warehouses or sheds a receiving station of its road for all cotton in common or uncompressed bales that might be delivered there or for any other purpose. It
53 denies that it had or ever had any interest or claim to or control over the said warehouses, sheds, or buildings belonging to said Union Compress Company or the ground upon which they were located at the foot of Main street, in the said city of Little Rock, as aforesaid. It denies that it ever received any cotton from the foot of Main street from any person or persons whomsoever. It denies that it ever made said point a depot or receiving station for cotton belonging to any person or persons whomsoever, or that it had any right, power, or authority so to do, but it says that the said

property belonged entirely and exclusively to the said Union Compress Company, in which this defendant had no interest whatever and over which it had no control. It says that the said Union Compress Company, for its own convenience, did receive cotton at said point for compression and storage, and done so for many years and long prior to the 14th day of November, 1887, both as a ware-
54 houseman and for the purpose of compression; that upon receipt of such cotton it issued its warehouse receipt to the owners thereof; that the various railway companies doing business at the city of Little Rock would, at the request of the holders of said warehouse receipts for cotton so stored with said Union Compress Company for compression, whether the same were stored at the foot of Main street or at other points in the city of Little Rock or Argenta, take up the aforesaid receipts of the compress company and issue bills of lading to the shippers, thereby becoming the bailors of the said compress company, by whom said cotton continued to be held for compression; and it was well understood by the shippers of said cotton, upon the issuing to them of bills of lading as aforesaid, that the cotton was to remain in the possession and custody of the compress company until it should be compressed and prepared for shipment, and was not to be taken possession of by the railway
55 company for transportation until it had been compressed by said Union Compress Company.

Defendant denies that at the time of said fire there were 4,000 bales of cotton in said sheds for which it had issued bills of lading, or that it had ever received any of the cotton that was stored in said sheds, or that it had any control whatever over the same.

It denies that it ever held out any inducement to the owners or shippers of cotton to deliver the same at that point. It denies that this defendant ever suffered or permitted a large amount of cotton to unreasonably accumulate at the sheds of the said Union Compress Company, or that it unreasonably neglected or refused to remove said cotton, or that it had any control over the same in any manner whatever.

That as to whether or not R. E. Douglass & Co. had ninety-
56 three (93) bales of cotton in the Union Compress Company's sheds and warehouses at the foot of Main street, in said city of Little Rock, at the time of the fire, this defendant knows nothing and has no information upon which to found a belief, and therefore denies the same; that as to the value of said cotton it knows nothing, and therefore denies that it was of the value of three thousand nine hundred and ninety dollars and forty-seven cents (3,990.47); that as to whether or not the plaintiff in this suit ever issued a policy of insurance covering said cotton in favor of the said R. E. Douglass & Co. for the use of itself and the owners thereof, insuring them against any loss that they might sustain by reason of fire, or as to whether it has paid anything thereon to the said R. E. Douglass & Co. this defendant knows nothing and has no information upon which to found a belief, and therefore denies the same; that this defendant denies that it had any con-

trol of any kind or character over the said Union
57 Compress Company, or that it had any power to prevent them receiving cotton at the foot of Main street or at any other point; it denies that it was in any manner responsible for the accumulation of cotton at said point, or that it was in any way responsible for the fire which destroyed the same; it denies that it had any control over or interest in the manner of receiving, storing, caring for, and handling the said cotton stored in the sheds and warehouses of the said Union Compress Company at the foot of Main street at the time, and it says it had absolutely no control over the said sheds and warehouses or compress at the foot of Main street at the time said fire occurred or prior thereto.

II. For answer to second count of the complaint defendant says that as to whether or not R. E. Douglass & Co. had deposited ninety-three (93) bales of cotton of the value of $3,990.47 in the sheds
58 or warehouses of the Union Compress Company at the foot of Main street, in the city of Little Rock, or had said cotton insured by plaintiff against loss by fire on the 20th day of September, 1887, defendant has no knowledge or information upon which to found a belief, and therefore denies the same; it denies emphatically that this defendant, either alone or jointly with the Union Compress Company, caused the said bales of cotton to be piled in the public streets of the said city of Little Rock adjoining the said Union Compress Company's sheds and warehouses at the foot of Main street, or that it had any control over or interest in the said sheds, warehouses, or streets adjacent thereto; it denies that it took any part of any kind or character in the creation of any public nuisance in the streets of Little Rock, if any was created there, on the 14th day of November, 1887, or prior thereto.

III. And for further answer to the 1st and 2d counts of
59 said complaint defendant says that if the said cotton was destroyed by fire by reason of any careless acts of the said Union Compress Company or others this defendant is in no manner respo-sible therefor.

But it says that if the said R. E. Douglass & Co. stored their said cotton in the warehouses and sheds of the Union Compress Company at the foot of Main street at the time alleged in said complaint they did so with the full and perfect knowledge that there was a large accumulation of cotton at said points, and that the same was accumulating there faster than the said compress company could handle the same; that they were aware of the mode and manner in which said cotton was stored, cared for, guarded, and handled by the Union Compress Company, and were at the time stockholders and officers in the said Union Compress Company, and by their own acts in the premises contributed to the loss of said
60 cotton, if any they did lose.

Defendant specifically denies all the allegations of carelessness or negligence, either of omission or commission, on its part, as alleged and set up in the complaint, and says that it was guilty of no want of care in any respect whatever which would in any man-

ner contribute to, approximately or otherwise, the cause of said fire on November 14, 1887.

IV. And for further answer to the 1st and 2d counts of plaintiff's complaint defendant says that the members of the firm of R. E. Douglass & Co., the said assured, are citizens of the same State as this defendant; that the property insured exceeded in value the sum paid by plaintiff; wherefore defendant says that this court has no jurisdiction of this action.

V. For answer to 3d count of plaintiff's complainant defendant says: It admits that prior to September 20, 1887, the Union
61 Compress Company was engaged in compressing cotton for transportation at Little Rock, Arkansas. It denies that its only compress was situated at the town of Argenta, Arkansas, but says that said Union Compress Company had its compress buildings located for many years at the foot of Main street, in the city of Little Rock, Arkansas, and had been engaged up to within a short period prior to the said 20th day of September, 1887, in compressing cotton at said foot of Main street, and at the date above referred to was receiving cotton at said point in its compress building, warehouses, and sheds for the purpose of compressing the same.

It says further that the said Union Compress Company on said date was erecting a new compress in the eastern portion of the city of Little Rock, which at that time was not quite ready to receive cotton for compression.

62 It admits that its line of railroad ran alongside of the said compress and warehouses belonging to the said Union Compress Company, situated in the city of Little Rock and at the foot of Main street, but it denies that it ever made any contract with the said Union Compress Company by which it agreed or held out any inducement to the said compress company or the public to receive cotton at its compress and warehouses at the foot of Main street, in the city of Little Rock, or anywhere else, but it says it gave the said Union Compress Company a certain rate per car-load, whereby it agreed to haul all of the cotton of the said compress company from its compress and warehouses and sheds at the foot of Main street and elsewhere in the city of Little Rock to its compress in Argenta whenever it should desire to transfer cotton from one place to the other.

63 Defendant says that for many years a compress and warehouses had been erected at the foot of Main street, in the city of Little Rock, by individual enterprise; that the said compress and warehouses were built alongside of its tracks long after said tracks were constructed and in operation, but it denies that it had any part in the erection or control of the said compress buildings, warehouses, or sheds at the foot of Main street, either before or at the time of the fire referred to in the complaint, and it denies that for the purpose of realizing more and increasing the profits by hauling cotton from the said foot of Main street it made the said Union Compress Company buildings and warehouses or sheds a receiving station of its road for all cotton in common or uncompressed bales that might be delivered there or for any other purpose.

It denies that it had or ever had any interest or claim to or control over the said warehouses, sheds, or buildings belonging to
64 said Union Compress Company or the ground upon which they were located at the foot of Main street, in the said city of Little Rock as aforesaid. It denies that it ever received any cotton from the foot of Main street from any person or persons whomsoever. It denies that it ever made said point a depot or receiving station for cotton belonging to any person or persons whomsoever, or that it had any right, power, or authority so to do, but it says that the said property belonged entirely and exclusively to the said Union Compress Company, in which this defendant had no interest whatever and over which it had no control. It says that the said Union Compress Company for its own convenience did receive cotton at said point for compression and storage, and done so for many years, and long prior to the 14th day of November, 1887, both as a warehouseman and for the purpose of compression; that upon receipt of such cotton it issued its warehouse receipt to the owners thereof; that the various
65 railway companies doing business at the city of Little Rock would, at the request of the holders of said warehouse receipts for cotton so stored with said Union Compress Company for compression, whether the same were stored at the foot of Main street or at other points in the city of Little Rock or Argenta, take up the aforesaid receipts of the compress company and issue bills of lading to the shippers, thereby becoming the bailors of the said compress company, by whom said cotton continued to be held for compression, and it was well understood by the shippers of said cotton upon the issuing to them of bills of lading as aforesaid that the cotton was to remain in the possession and custody of the compress company until it should be compressed and prepared for shipment, and was not to be taken possession of by the railway company for transportation until it had been compressed by said Union Com-
66 press Company.

Defendant denies that at the time of said fire there were 4,000 bales of cotton in said sheds, for which it had issued bills of lading, or that it had ever received any of the cotton that was stored in said sheds, or that it had any control whatever over the same.

It denies that it ever held out any inducement to the owners or shippers of cotton to deliver the same at that point. It denies that this defendant ever suffered or permitted a large amount of cotton to unreasonably accumulate at the sheds of the said Union Compress Company, or that it unreasonably neglected or refused to remove said cotton, or that it had any control over the same in any manner whatsoever.

That as to whether or not the Howell Cotton Company had one hundred and sixty-five (165) bales of cotton in the Union Compress Company's sheds and warehouses at the foot of Main street, in said city of Little Rock, at the time of the fire, this defendant
67 knows nothing and has no information upon which to found a belief, and therefore denies the same; that as to the value of said cotton it knows nothing, and therefore denies that it was of

the value of seven thousand nine hundred and seventy-one dollars (7,971.00); that as to whether or not the plaintiff in this suit ever issued a policy of insurance covering said cotton in favor of the said Howell Cotton Company for the use of itself and the owners thereof, insuring them against any loss that they might sustain by reason of fire, or as to whether it has paid anything thereon to the said Howell Cotton Co. this defendant knows nothing and has no information upon which to found a belief, and therefore denies the same; that this defendant denies that it had any control of any kind or character over the said Union Compress Company, or that it had any power to prevent their receiving cotton at the foot of Main street
68 or at any other point; it denies that it was in any manner responsible for the accumulation of cotton at said point, or that it was in any way responsible for the fire which destroyed the same; it denies that it had any control over or interest in the manner of receiving, storing, caring for, and handling the said cotton stored in the sheds and warehouses of the said Union Compress Company, at the foot of Main street, at the time, and it says it had absolutely no control over the said sheds and warehouses or compress at the foot of Main street at the time said fire occurred or prior thereto.

VI. For answer to 4th count of the complaint defendant says— That as to whether or not the Howell Cotton Company had deposited —— bales of cotton of the value of —— in the sheds or warehouses of the Union Compress Company, at the foot of
69 Main street, in the city of Little Rock, or had said cotton insured by plaintiff against loss by fire on the 20th day of September, 1887, defendant has no knowledge or information upon which to found a belief, and therefore denies the same. It denies emphatically that this defendant, either alone or jointly with the Union Compress Company, caused the said bales of cotton to be piled in the public streets of the said city of Little Rock adjoining the said Union Compress Company's sheds and warehouses at the foot of Main street, or that it had any control over or interest in the said sheds, warehouses, or streets adjacent thereto. It denies that it took any part of any kind or character in the creation of any public nuisance in the streets of Little Rock, if any was created there, on the 14th day of November, 1887, or prior thereto.

VII. And for further answer to the 3d and 4th counts of said complaint defendant says that if the said cotton was destroyed by
70 fire by reason of any careless acts of the said Union Compress Company or others this defendant is in no manner responsible therefor.

But it says that if the said Howell Cotton Company stored their said cotton in the warehouses and sheds of the Union Compress Company at the foot of Main street at the time alleged in said complaint they did so with a full and perfect knowledge that there was a large accumulation of cotton at said points, and that the same was accumulating then faster than the said compress company could handle the same; that they were aware of the mode and manner in which said cotton was stored, cared for, guarded, and handled

by the Union Compress Company, and that members of said Howell Cotton Company were at the time stockholders and officers in the said Union Compress Company and by their own acts in the
71 premises contributed to the loss of said cotton, if any they did lose.

Defendant specifically denies all the allegations of carelessness or negligence, either of omission or commission, on its part, as alleged and set up in the complaint, and says that it was guilty of no want of care in any respect whatever which would in any manner contribute to, approximately or otherwise, the cause of said fire on November 14, 1887.

VIII. And for further answer to the 3d and 4th counts of said complaint defendant says that the members of the firm of the Howell Cotton Company, the said assured, are citizens of the same State as this defendant; that the property insured and alleged to have been burned exceeded in value the sum paid by plaintiff.

Wherefore defendant says this court has no jurisdiction of this action.

IX. And for further and complete defense to the action in this suit defendant says—

72 That the plaintiff is a foreign corporation doing business in the State of Arkansas; that prior to the making and entering into the contract upon which this action is based the said plaintiff wholly failed, refused, and neglected to comply with the conditions and provisions of an act of the General Assembly of Arkansas entitled "An act to prescribe the conditions upon which foreign corporations may do business in this State," approved April 4, 1887; that by reason of said refusal and neglect to comply with the said statutes of this State the contract upon which this action is based is void, and the courts are by law forbidden to enforce the same or any right growing out of them in favor of the said plaintiff.

Wherefore defendant says that said plaintiff has no legal capacity to institute this suit.

J. M. MOORE & DODGE & JOHNSON,
Att'ys for Def't.

73 Filed Feb'y 3, 1890.

RALPH L. GOODRICH, *Clerk.*

And on February 7, 1890, as follows:

Comes the plaintiff, by Sanders and Watkins, U. M. & G. B. Rose, and E. W. Kimball, Esqrs., its attorneys, and comes the defendant, by Dodge and Johnson and J. M. Moore, Esqs., its attorneys, and, both parties announcing themselves ready for trial, a jury came, to wit, George W. Clark, J. H. Sannoner, J. Kellogg, E. D. Bradshaw, T. W. Newton, James Chappell, H. E. Erwin, S. Volmer, W. M. Rose, J. M. Percival, F. P. Cates, and A. Bales, being twelve good and lawful men of the district, who were duly tried, empannelled, and sworn well and truly — the issues joined between the plaintiff and the defendant and a true verdict give according to the law and the evidence, and thereupon the jury proceed to
74 hear the evidence as well on the part of the plaintiff as of the

defendant, and, the trial hereof not being concluded, the same is continued until to-morrow morning.

And on February 8, 1890, as follows:

Comes the plaintiff, by Sanders and Watkins, U. M. & G. B. Rose, and E. W. Kimball, Esqrs., its attorneys, and comes the defendant, by Dodge and Johnson and J. M. Moore, Esqrs., its attorneys, and comes the jury, to wit, George W. Clark, J. H. Sannoner, J. Kellogg, E. D. Bradshaw, T. W. Newton, James Chappell, H. E. Erwin, S. Volmer, W. M. Rose, J. M. Percival, F. P. Cates, and A. Bales, and, the trial hereof not being concluded on yesterday, the same is now resumed, and, the trial hereof not being concluded, the same is continued until Monday morning.

On February 10, 1890, as follows:

75 Comes the plaintiff, by Sanders and Watkins, U. M. & G. B. Rose, and E. W. Kimball, Esqrs., its attorneys, and comes the defendant, by Dodge and Johnson and J. M. Moore, Esqrs., its attorneys, and comes the jury, to wit, George W. Clark, J. H. Sannoner, J. Kellogg, E. D. Bradshaw, T. W. Newton, James Chappell, H. E. Erwin, S. Volmer, W. M. Rose, J. M. Percival, F. P. Cates, and A. Bales, and, the trial hereof not being concluded on Saturday, the same is now resumed, and, the trial hereof not being concluded, the same is continued until to-morrow morning.

And on February 11, 1890, as follows:

Comes the plaintiff, by Sanders and Watkins, U. M. & G. B. Rose, and E. W. Kimball, Esqs., its attorneys, and comes the defendant,

76 by Dodge & Johnson and J. M. Moore, Esqrs., its attorneys, and comes the jury, to wit, George W. Clark, J. H. Sannoner, J. Kellogg, E. D. Bradshaw, T. W. Newton, James Chappell, H. E. Erwin, S. Volmer, W. M. Rose, J. M. Percival, F. P. Cates, and A. Bales, and, the trial hereof not being concluded on yesterday, the same is now resumed, and, the trial hereof not being concluded, the same is continued until to-morrow morning.

And on February 12, 1890, as follows:

Comes the plaintiff, by Sanders and Watkins, U. M. & G. B. Rose, and E. W. Kimball. Esqs., its attorneys, and comes the defendant, by Dodge & Johnson and J. M. Moore, Esqrs, its attorneys, and come the jury, to wit, George W. Clark, J. H. Sannoner, J. Kellogg, E. D. Bradshaw, T. W. Newton, James Chappell, H. E. Erwin, S. Volmer, W. M. Rose, J. M. Percival, F. P. Cates, and A. Bales, and,

77 the trial hereof not being concluded on yesterday, the same is now resumed, and, the trial hereof not being concluded, the same is continued until to-morrow morning.

And on February 13, 189-, as follows:

Comes the plaintiff, by Sanders and Watkins, U. M. & G. B. Rose, and E. W. Kimball, Esqrs., its attorneys, and comes the defendant, by Dodge and Johnson and J. M. Moore, Esqrs., its attorneys, and come the jury, to wit, George W. Clark, J. H. Sannoner, Jonathan Kellogg, E. D. Bradshaw, Thomas W. Newton, James Chapple, H.

E. Erwin, S. Volmer, W. M. Rose, J. M. Percival, F. P. Cates, and A. Bales, and, the trial hereof not being concluded on yesterday, the same is now resumed, and the jury, having heard all the evidence and argument of counsel and having been charged and instructed by the court, retired to consult of their verdict, and afterwards
78 returned into court the following verdict: We, the jury, find the issues for the plaintiff and assess its damages at the sum of thirteen thousand four hundred and seventy-five dollars and ninety-three cents.

It is therefore considered, ordered, and adjudged that said plaintiff, The Marine Insurance Company of London, do have and recover of and from said defendant, The St. Louis, Iron Mountain and Southern Railway, the sum of thirteen thousand four hundred and seventy-five dollars and ninety-three cents ($13,475.03) found as aforesaid for its damages, together with all its costs herein expended, and have execution therefor.

The following opinion was filed in the case:

79 CALDWELL, *J.*:

Our statute requires that "every action must be prosecuted in the name of the real party in interest." Mansf. Dig., § 4933. It also provides that "where the assignment of a thing in action is not authorized by statute the assignor must be a party, as plaintiff or defendant." Section 4934. The latter section has no application to the present case. The complaint does not allege any assignment. The right of the insurance company that has paid a loss to recover of the wrong-doer after payment of the loss does not depend upon contract, agreement, stipulation, or privity. Sheld. subr., § 1. The right of subrogation is sometimes spoken of as an "equitable assignment;" but that is only a convenient figure of speech. From the time of the insurance the insurer has a pecuniary interest in the thing insured, and he becomes entitled to a legal remedy whenever he suffers a loss by reason of that interest and it appears that the loss has been occasioned by the wrongful act of another. Of
80 course he has no right of action until he has paid the loss to the insured, because until that time he has suffered no damage. In Deshler *v.* Dodge, 16 How., 622, the plaintiff brought replevin for bills that had been assigned to him, and it was held that he was not suing in the character of assignee. So it has been held that when a note is made payable to bearer a transferee thereof does not hold by assignment, and that an executor holding under a will of his testator does not hold as assignee. Bushnell *v.* Kennedy, 9 Wall., 387, and cases cited. In Insurance Co. *v.* Insurance Co., 129 U. S., 462; 9 Sup. C't Rep., 469, the court say:

"From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's
81 rights of action against the carrier or other person responsi-

ble for the loss, and, in a court of admiralty, may assert in his own name the right of the shipper."

In respect of parties plaintiff, the first section of our civil code above cited renders our practice similar to that prevailing in the admiralty courts. It has been held under its provisions that the holder of a promissory note payable to order might sue on it without joining the payee, though the latter had never indorsed it. Heartman *v.* Franks, 36 Ark., 504. And it is held that under the reformed codes of procedure the action of the insurance company in cases of this sort may be brought in the name of the insurer. Sheld. subr., § 230; Swarthout *v.* Railway Co., 49 Wis., 625; 6 N. W. Rep., 314; Insurance Co. *v.* Railway Co., 73 N. Y., 405. When the value of the property destroyed exceeds the insurance money paid, then the suit must be brought in the name of the insured
82 (Insurance Co. *v.* Railway Co., 3 Dill., 1), though doubtless under our system of practice the insurer might be joined where the joinder would not oust the jurisdiction of the court (Crandall *v.* Transportation Co., 16 Fed. Rep., 75). But as it is alleged in the complaint in this cause that the plaintiff has paid the insured the full value of the property destroyed, it is plain that the latter have no interest in the present controversy, and hence they are not necessary parties.

That the plaintiff is suing in its own right and not as assignee of the insured, although its title may be in some sense derivative through them, is a proposition that is made equally obvious by the decision in Railroad Co. *v.* Dow, 120 U. S., 287; 7 Sup. Ct. Rep., 482. In that case Dow and others, acting as trustees under a mortgage, had expended money in taking up a prior mortgage given to secure a debt bearing the conventional rate of interest of ten per cent. per annum, the legal rate being six per cent. per annum.
83 The trustees brought suit, claiming that they were entitled to enforce the prior mortgage, and that standing in the shoes of the mortgagee they should be allowed interest on the debt secured by the mortgage at the conventional rate, but the court refused to entertain this view and held that after payment the trustees could claim no more than six per centum per annum.

The court said: "The right of subrogation is not founded on contract. It is a creature of equity, is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contractual relations between the parties." And in Johnson *v.* Barrett, 117 Ind., 551; 19 N. E. Rep., 199, the court say: "Subrogation is the substitution of another person in place of a creditor, so that the person substituted will succeed to all the rights of the creditor, having reference to the debt due him. It is independent of any merely contractual relations between the parties to be affected by it, and is broad enough to include every instance in which
84 one party is required to pay a debt for which another is primarily answerable." The demurrer was overruled.

The defendant filed an answer admitting the contract between it and the Union Compress Company, but it denied that it had made the cotton sheds in Little Rock a receiving station for the shipment

of cotton; asserted that the cotton in the sheds was solely in the possession and under the control of the compress company; denied that it ever induced shippers to deliver cotton at the sheds, or that it ever permitted cotton unreasonably to accumulate at that place; denied that it had participated in the creation of a public nuisance in the street; denied all carelessness and asserted that the insured were stockholders and officers of the compress company, and that by storing the cotton in the sheds they had contributed to the loss thereof. The defendant pleaded further that the plaintiff was a
foreign corporation, doing business in the State of Arkansas,
85 and that at the time of the issue of the policies it had never complied with the requirements of a statute of that State mentioned in the opinion of the court.

The cause was tried before a jury, when the following facts appeared in evidence: The cotton sheds referred to were located on the corner of Main and Water streets, in Little Rock, two streets that cross each other at right angles, the latter street running parallel with the Arkansas river, which was near by. At that point Main street approaches the river by a steep descent and is therefore rarely used except by footmen, by whom it was much used, mainly in going across Water street to a club-house built near the river and for the purpose of crossing the river on several skiff ferries that landed at the foot of Main street. On Water street the defendant operated a railroad, which had a switch made for the purpose of
receiving cotton from a platform built in front of the cotton
86 sheds by the compress company. By the terms of the agreement between the compress company and the defendant, made early in September, 1887, the defendant was to take cotton in common bales delivered at the sheds to Argenta for compression for the price of two (2) dollars a car, and, as common carriers preferred to have the cotton compressed for the convenience of transportation, it was agreed that the compress company should load the cotton on cars, to be provided by the *the* defendant, in Little Rock, whence it was to be carried to the compress in Argenta and there compressed by it and reloaded on cars for further shipment to any point to which it might be consigned, the compress company insuring the cotton from loss by fire while it might be lying at the sheds and subsequently until reloaded on the cars after compression for the benefit of the defendant, all for the price of 13 cents for each hundred pounds of cotton. The Memphis and Little Rock Railroad Company also had a like arrangement with the compress
company, but it had no access to the sheds in Little Rock
87 and could only get the cotton to be shipped by its line by a side track running by the compress building in Argenta. The custom of doing this business was of some years' standing and had its origin in a like agreement between the Little Rock Oil and Compress Company and the defendant.

The Union Compress Company was organized in June, 1887, and succeeded to the property and business of the former company, and at the beginning of the cotton season of that year it renewed and continued the agreement that previously had been acted upon.

The customary manner of doing the business was as follows: Any shipper in Little Rock having cotton to ship to any point in the United States or Europe would take it to the cotton sheds and thereupon the compress company would give him a receipt for the same in the form of a printed warehouse receipt. This the shipper would take to the office of the defendant or to that of the Memphis & Little Rock Railroad Company, which would take up the receipt and would give to him a bill of lading for the transportation
88 of the cotton to its final destination in Europe or America, reserving in the bill of lading the right to compress the cotton so received. Upon this the railway company notified the shipment to the compress company, which at once insured the cotton for the benefit of the railway company, as above stated.

It appeared that very large quantities of cotton were thus received by the compress company during the three months immediately preceding the fire. The evidence showed that the defendants had not furnished cars to remove the cotton thus deposited; that the place where it was deposited was near the business center of the city; that the compress company exercised control over its sheds and grounds in Little Rock, but that at the compress in Argenta there was a shipping clerk, whose salary was paid by the compress company and the defendant jointly. At the time of the fire the cotton had accumulated at the sheds until there were from 3,600 to 4,000 bales at that place. The sheds had been filled to overflowing
89 until a lower story on Water street, not intended for the storage of cotton, had been filled, after which cotton was placed outside, on the platform utilized in loading it on cars, and then it had been piled across Main street, which was shown to be a public street, leaving only a narrow way for footmen to pass, as above stated. At the time of the fire there were thus deposited 1,463 bales of cotton for which bills of lading had been given by the defendant and 1,211 bales for which the Memphis and Little Rock Railroad Company had given bills of lading. The rest of the cotton, including that to which this suit directly relates, was unbilled. There was evidence to show that it was the custom of shippers to deposit cotton of a grade required until the proper number of bales of that grade could be gathered together, when it would be shipped under one bill of lading. Further, that the cotton of Douglass & Co. and the Howell Cotton Company was thus deposited, waiting an opportunity to make corresponding additions preparatory to shipment.

90 It also appeared that, owing to the block of cotton at the sheds in October and November, the compress company had objected to the depositing of cotton at the sheds unless for the purpose of immediate shipment, but that it had never actually refused to receive any cotton brought to its sheds, and that defendant had continued to give bills of lading for all cotton which was offered for shipment down to and including the day of the fire. It also appeared that Douglass & Co. and the Howell Cotton Company were fully aware of all the facts above stated at the time the insurance was taken, and one or more members of each firm owned stock in

the compress company, and that the cotton insured by them would have been included in bills of lading within a day or two if the fire had not occurred. Of all the cotton shipped from Little Rock during the cotton season of 1887, being about 35,000 bales previous to the fire, only about fifty bales, as it appeared, had been shipped from any other point save the cotton sheds,
91 of the compress company, and some 500 to 1,000 bales that had been hauled to the depot of the Memphis and Little Rock Railroad Company in Little Rock on account of the block of cotton at the sheds at the foot of Main street. At the time of the fire the accumulation of cotton at the sheds had been going on for five or six weeks, and some of the cotton that was burned had been entered on bills of lading as much as five weeks before the fire. It was shown that at that time the weather was unusually dry; that, while other persons having cotton near the railway sprinkled it after the passage of each train, nothing was done to protect the cotton in and near the sheds at the foot of Main street, except that a watchman was kept to look after it. Persons smoking pipes, cigars, and cigarettes passed at will along the passage on Main street, between the cotton bales, and the cotton had been previously fired more than once by accident and the fire had been put out. It was shown that the officers of the compress company, during the
92 time that the cotton was there accumulating, made repeated demands on the defendant for cars to remove the cotton, but that none was furnished.

The defendant introduced testimony to prove that during the autumn of 1887 there was a large and unexpected increase of freight for its road, growing out of an unexpected increase in the manufacture of lumber and the early maturing of the cotton crop, so that it was impossible to procure cars to meet the demand thus made; but the car-service agent of the defendant, being one of its witnesses, testified that in 1887 there were plenty of cars at Little Rock to have removed the cotton, and that he did not know why it was not removed. The defendant offered to prove that the city council of Little Rock had leased the ground in Main street, at the foot thereof, to the Little Rock Oil and Compress Company for the storage of cotton, and that it had succeeded to its rights. This was objected to because the council had no right to lease a public street for private uses and because the lease provided that it should
93 not be assigned without the council's consent, which was not shown. The plaintiff read an ordinance of the city forbidding, under a penalty, the storage of goods or commodities on the streets, and a proclamation of the mayor of the city, issued in September of 1887, calling attention to the illegality and danger of storing cotton in the streets. The evidence also showed that the bales of cotton in the street had been, for the most part, if not all, cut open for the purpose of sampling them, and that holes were thus left in the bales when the cotton was exposed; also that the bailing covering the bales was made of cloth of a very inflammable character. The fire originated in or near the narrow passage between the bales on Main street, and was kindled by a match in

the hands of a boy who was passing and who was smoking a cigarette. The fire destroyed all the property above mentioned, and much other valuable property, real and personal.

94 As the questions involved in this case have been extensively discussed, and the case itself presents some novel features, I think it proper to state my conclusions of law upon the evidence adduced. As to the more material questions of fact, there is hardly a conflict in the testimony.

I have had no difficulty in excluding the lease from the city council. To say nothing about the clause against assignment of the lease, it was plainly *ultra vires* and void. The streets of the city do not belong to the council, but to the public, and by that I mean the public at large, and not merely the inhabitants of the city, and to their use they are forever dedicated. The city charter makes it the duty of the city council to keep them open and free from nuisance. It provides that "the city council shall have the care, supervision, and control of all the public highways, bridges, streets, alleys, public squares, and commons within the city, and shall cause the same to be kept open and in repair and free from nuisance."

95 See Mansf. Dig., 737. The only legal effect of the lease, it would seem, is to render the city liable for the damages resulting from such a licensed nuisance. Cleveland *v.* King, 132 U. S., 295; 10 Sup. Ct. Rep., 90. It makes no difference that, owing to the declivity at the foot of Main street, the street at that point was not commonly frequented by vehicles. The requirements of the public as to property set aside for its perpetual use was not a matter to be passed on by the council, and it is plain that, by the establishment of a ferry or the building of a bridge at that point, it might at any time become one of the most frequented of all the thoroughfares of the city, the expansion and amelioration of which cannot be hindered by leases of the streets by the city council. The law is well settled, as it ought to be, that all such leases are void. 2 Dill. Mun. Corp., § 660; McDonald *v.* Mayor (N. J.), 7 Atl. Rep., 855; Harrisburg's Appeal (Pa.), 10 Alt. Rep., 787; Gas Co. *v.* Teel, 20 Ind., 131.

96 The Union Compress Company and the defendant had the same right to use Main street that others had; no greater and no less. Cotton or commodities of any kind may be lawfully placed in the street for immediate transportation, but no one can have the right to appropriate any part of a street to a private use. The city ordinance that was read only gives emphasis to what was the law before it was passed and what would remain the law if it were repealed. The storage of goods or impediments of any kind on the street for an unreasonable time is an act that constitutes a nuisance, Patterson *v.* Railroad Company, 56 Mich., 172; 22 N. W. Rep., 260; Henry *v.* Dennis, 93 Ind., 452; 47 Amer. Rep., 378; Maddox *v.* Cunningham, 68 Ga., 431; Turner *v.* Holtzman, 54 Md., 148; Wendell *v.* Mayor, 39 Barb., 336; Callanan *v.* Gillman, 107 N. Y., 360; 14 N. E. Rep., 264; and one who thus encroaches on a street for an unreasonable length of time is guilty of creating and main-

taining a nuisance, whether the encroachment materially in-
97 terferes with the use of the street or not. "The right to pass and repass upon a public highway is not restricted to any part, for 'the public are entitled not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler.' 1 Hawk P. C., c. 32, § 11." State *v.* Berdetta, 73 Ind., 185; 38 Amer. Rep., 117, and note. In this case there was not only an obstruction of the street, but the obstruction was caused by many thousands of bales of cotton, a very combustible material, contiguous to the business center of the city. It was created and continued for several weeks through a very dry season, when the cotton was in danger of being fired by the sparks of passing locomotives, by persons smoking in the street, and by other means. Considering the fact that it would be next to impossible to extinguish a fire originating in this accumulation of combustible material until the whole of it should be consumed, and that the fire thus kindled would probably be communicated in-
98 definitely to buildings and property throughout the city, involving not only great pecuniary loss but probably loss of life as well, it is impossible to say that this aggregation of cotton thus placed was not a nuisance of a very alarming nature. What did happen—the burning of the cotton, with much valuable adjacent property—was just what might have been reasonably apprehended and what it seems and was apprehended by the officers of the compress company.

It is not necessary to say that the defendant was the sole party in fault in the matter, for whoever aids or assists in creating, maintaining, or continuing a nuisance is responsible for any loss or damage that may be caused thereby. What was called the "cotton shed" of the compress company at the foot of Main street was simply a large brick building, covered with a gravel roof, two stories in height, the upper story being intended for the storage of cotton, having an incline by which bales
99 of cotton were rolled down to the lower story for compression by the machinery which had been formerly operated in the lower story, but which had been removed some months before the opening of the cotton season of 1887. This lower story, not intended for the storage of cotton, was covered in front with iron, with several doors opening on the platform which formed a connection with the cars of the defendant on its side track whenever they were placed there for the purpose of receiving it. As the cotton was not removed by the defendant as it came in, the upper story became filled, and new accessions of bales were placed in the lower story until that was filled; whereupon cotton newly arrived was placed along the platform outside and on the street until it covered the entire street for a considerable distance, except the narrow passageway for pedestrians. Witnesses testify that if the cotton had been removed as it came in the compress company would have
100 had room for the convenient storage of all cotton that was left there temporarily for the making up of lots for shipment. That the defendant is responsible for the state of things that

resulted in the fire, causing the loss for which the plaintiff sues, I have no doubt. If it had removed the cotton as it was received the cotton in the sheds would have been reasonably safe—as safe as cotton deposited in other sheds in the city. This is not a suit upon the contract between the compress company and the defendant, but the action is based on the assumption that the defendant contributed to the creation and continuance of the nuisance. If A should make a contract with B by which the latter should contract to deliver to him in front of his premises in the street a certain quantity of gunpowder, agreeing that he would remove it to a place of security or to a place less dangerous, and he should not remove it after delivery, but should suffer it to remain in the street until it ex-
101 ploded, to the injury of a third person, he could hardly be heard to say that the nuisance was created by B and not by himself.

One may become responsible for aiding in the creation of a nuisance either by action or by neglecting to act. It is not necessary to weigh the comparative responsibility of the defendant and the compress company. The latter might have broken off its contract with the defendant and have refused to receive cotton after the breach of the contract became apparent, but I do not think that it lies in the mouth of the defendant to say that it ought to have done so; and it seems to me that the prime fault was in the defendant in not removing the cotton as it had agreed to do, and promptly as the exigency of the case demanded. At any rate, by its participation in the illegal acts complained of it became liable for any loss that might occur without regard to any question of liability on the part of the compress company.

Where the negligence of two or more persons contributes
102 to occasion a loss to a third person they are both liable for the damage sustained. Slater *v.* Mersereau, 64 N. Y., 138. So where a landlord has a sidewalk that is out of repair and he leases it with a covenant on the part of the tenant to keep in repair, and after that one is injured by reason of the defect in the sidewalk, the landlord and the tenant are both liable for the injury. Davenport *v.* Ruckman, 37 N. Y., 568. Where an injury is the result of two concurring causes the party responsible for one of these causes is not exempt from liability, because the person who is responsible for the other cause may be equally culpable. Lake *v.* Milliken, 62 Me., 240; Barrett *v.* Railway Company, 45 N. Y., 628; Pretty *v.* Bickmore, 6 Moak, Eng. R., 182.

If we might say that the nuisance was created by the compress company, it would nevertheless be true that the defendant would be liable for the loss arising from the conflagration, since it is true that any one that continues a nuisance is as guilty as he
103 that creates it. Wasmer *v.* Railroad Co., 80 N. Y., 212; Brown *v.* Railroad Co., 12 N. Y., 487. Those who create or continue a nuisance in the street are bound, at their peril, to keep the street as safe as if the nuisance was not there. Irvin *v.* Wood, 4 Rob. (N. Y.), 142; Wendell *v.* Mayor, 39 Barb., 336; Anderson *v.* Dickie, 26 How. Pr., 117; Congreve *v.* Morgan, 18 N. Y., 84; Bizzell

v. Booker, 16 Ark., 308; Bonnell *v.* Smith, 53 Iowa, 282; 5 N. W. Rep., 128. One who creates a nuisance or who continues it is liable for any damage caused thereby, though the immediate cause may have been the negligence of another person. Meyers *v.* Malcom, 6 Hill, 292; Wood, Nuis., § 142; McAndrews *v.* Collerd, 42 N. J. Law, 189.

The liability of the defendant may, however, be placed on a distinct ground equally secure. The denial in the answer that the defendant did not make the cotton sheds one of its receiving stations is overturned by all the evidence in the case. Practically all
104 the cotton that was shipped from Little Rock in the autumn of 1887, prior to the fire, was shipped there. It will not avail the defendant to say that the cotton at the sheds was in the exclusive control of the compress company. As for the 1,463 bales for which it had issued its bills of lading, they are by law conclusively presumed to have been in its possession (Acts Ark., 1887, p. 84); and as to the 1,211 bales for which bills of lading had been issued by the Memphis & Little Rock Railroad Company, they were held by the compress company subject to its orders and as its agent. Without these the remaining cotton, embracing that for the value of which this suit is brought, could not have been destroyed in the way in which it was destroyed. Now, a railroad company which allows explosive or combustible materials to accumulate at a station until they become a nuisance must necessarily become liable for any injury sustained by reason thereof. Railroad Co. *v.* Conway, 8 Colo., 1; 5 Pac. Rep., 142; Scott *v.* Hunter, 46 Pa. St., 192; Wood, Nuis., §
105 142; Lake *v.* Milliken, 62 Me., 240; Bradley *v.* People, 56 Barb., 72.

The plea of contributory negligence is not sustained. The delivery of the cotton at the sheds by the insured was in no sense a proximate cause of the loss, and no act of negligence on the part of the plaintiff that is not a proximate cause of the injury complained of can be considered in the light of contributory negligence such as will bar a right of action. Beach., Contrib. Neg., § 10. Moreover, the defendant gave bills of lading for all cotton that was offered to it for shipment down to the very day of the fire, and it cannot now be heard to say that it was the fault of any one to trust it to perform its duties because it had shown itself to be untrustworthy in the past. Immunity from liability is not to be secured by a train of misconduct, however long continued.

A few cases illustrative of this principle may be mentioned. A tenant rented certain lands for 1877, knowing that a railroad company maintained a nuisance thereon in the shape of a pond
106 of water which affected the health of his family. With this knowledge he rented the place for the year 1878, when it became more sickly, so much so that he was unable to gather his crops, and he brought an action against the railroad company, and it was held that the tenant could presume that the latter would abate the nuisance; that the law did not require him to remove, but did require the company to abate the nuisance. Railroad Co. *v.* English, 73 Ga., 366. The law will not hold it imprudent in a

person to act upon the presumption that another will act in accordance with the rights and duties of both, even though he may have formerly conducted himself in a contrary manner. Newson *v.* Railroad Co., 29 N. Y., 383. The subject is discussed in Kellogg *v.* Railroad Co., 26 Wis., 223; Fraler *vs.* Water Co., 12 Cal., 555; Bowas *v.* Tow-line, 2 Sawyer, 27; see also Beach, Contrib. Neg., §§ 10, 13, 18, 23; Damour *v.* Lyons City, 44 Iowa, 276. Moreover, if it were held to be negligence on the part of the insured and others to deposit their cotton in the sheds, knowing that the defend-
107 ant had failed to remove other cotton promptly, as its duty required, still if the defendant, its officers and agents, knew of the negligence of the persons thus depositing their cotton, as the evidence shows that they did, it was their duty to avert the consequence of their negligent acts, and the defendant could not evade responsibility for a failure to do so. Railroad Co. *v.* Freeman, 36 Ark., 46.

The claim that the defendant is to be excused because, owing to an unexpected press of business, it had not cars sufficient to remove the accumulating cotton is not good in law, nor is it sustained by the evidence. A railway company may rightfully decline to receive freight offered when it has not necessary rolling stock and equipments to carry it without delay, but if it receives goods for transportation it is held to a compliance with its contract to transport them without unreasonable delay. Bussey *v.* Railroad Co., 13 Fed. Rep., 330. But while the evidence tends to show a lack of cars belonging to the defendant or under its control for moving the
108 freight on its lines in this State generally, the evidence of the principal witness for the defendant on this point, Mr. Hequemberg, is that only 15 or 20 cars were needed for transferring the cotton across the river, and that there were plenty of cars at Little Rock in 1887 to have removed every bale of it.

Another defense relied on is that the plaintiff is a foreign corporation that had not complied with the laws of this State at the time of the issue of its policies. This defense is based on the act approved April 4, 1887 (Acts Ark. 1887, p. 234), which provides "that before any foreign corporation shall carry on any business in this State" it shall file a certificate in the office of the secretary of state designating an agent, a citizen of this State, upon whom service of process may be made, and that in default thereof the contracts of such foreign corporations with citizens of this State shall be void. There is no force, however, in this defense, since the evidence shows that
109 the contracts of insurance were made in the State of New York and that the policies were issued in that State. As was said by Gresham, J., in Lamb *v.* Bowser, 7 Biss., 315, it is hardily competent for the legislature of this State "to declare that the citizens of this State shall not be allowed to make such contracts as they please out of the State for the insurance of their property, whether it be within or without the State." Certainly it was not the intention of the legislature to go so far, and the court so held in that case, where the statute was the same in substance as our own. Certainly the issuing of a policy in New York on property here cannot

be considered as the carrying on of business in this State within the intent and meaning of the statute in question. It is at least doubtful whether the defendant could successfully interpose the defense, even if the issuing of the policies was within the purview of the statute. In the case of the Manistee, 5 Biss., 384, the court said:

110 "If the owner of the cargo had not taken a policy from the agent of this company, but had shipped without insurance, he would be entitled to recover of the carrier for the loss the value of the cargo. In my opinion, the carrier should not be permitted to make this defense. The shipper might have brought a libel for the use of the company, and if the use were not expressed in the record the court would protect the company, even after a decree in favor of the libelant."

There is another ground upon which this defense must fail. The legislature of this State, in reference to insurance, has always formed a distinct title by itself and has not been in any way blended with enactments referring to corporations generally. It may be said to form something like a separate code, which has been added to from time to time as circumstances required. By an act approved April 25, 1873, it was provided in effect that no foreign insurance company should do business in this State without first filing with

111 the auditor a stipulation agreeing that any process served on the auditor or an agent to be designated by the company should have the same effect as if served on the company, and that if any such company should cease to maintain an agent in this State such process might thereafter be served on the auditor. Mans. Dig., § 3834.

This statute accomplishes for foreign insurance companies the same results that are sought to be obtained as to other foreign corporations by the later act. It has been in force for a good many years, and has been found satisfactory. The act of 1887 contains no repealing clause, and as these two statutes are not inconsistent, and implied repeals are not favored, I think that they are both in force, and that the statute of 1887 has no application to insurance companies.

Entertaining these views upon the questions of law that have been raised and discussed, I shall therefore charge the jury as follows:

112 The complaint charges that the defendant and the Union Compress Company, by an agreement between themselves and by a general course of business, made the cotton sheds of the compress company at the foot of Main street a receiving station for cotton to be sent from this city by any one to the compress of said Union Compress Company, in Argenta, for compression, and that defendant should transport all cotton thus received, and that the defendant failed to transport the cotton thus received promptly, but suffered it to accumulate at said cotton sheds and in Main street, a public highway of the city, until it became a public nuisance and — set on fire in Main street, and that by reason of said fire the cotton insured by it mentioned in the complaint was destroyed.

The agreement mentioned in the complaint between the Union Compress Company and the defendant is admitted in the answer, and it is also admitted that the cotton did accumulate in said cotton sheds and at the foot of Main street, and that it was fired in said street; but the
113 defendant alleges that it is not responsible for the loss of the cotton mentioned in the complaint because, owing to an unexpected demand on it for cars for transportation of freight in the months of September, October, and November, 1887, it could not furnish the means of transportation of the cotton received at said cotton sheds promptly, according to its agreement. The court now instructs you that by said agreement it was the duty of said defendant to transport the cotton thus received at said cotton sheds for shipment promptly to Argenta, and that if defendant failed to do so and by reason of the continued reception of cotton at said sheds and the continued giving of bills of lading therefor as often as demanded by shippers down to the day of the fire cotton was suffered to accumulate in said sheds and on Main street until it endangered the property of others in the immediate vicinity and that mentioned in the complaint, then said defendant was guilty of aiding in the creation and maintenance of a public nuisance and is liable for the loss mentioned in the complaint, and its defense
114 that it was hindered from transporting said cotton from the foot of Main street by reason of an unexpected pressure of business is not sustained by the evidence. The defendant has pleaded further that it is not liable for the injury complained of in this cause because Douglass & Co. and the Howell Cotton Company, by their own negligence, contributed to said loss of said cotton; but the court instructs you that there is no evidence to sustain this defense. If the jury find that the defendant was guilty of aiding in creating, maintaining, or continuing said nuisance as aforesaid, and that the cotton mentioned in said complaint was destroyed by reason thereof, and the jury find that at the time of its loss it was insured against fire by the plaintiffs, and the plaintiffs have since that time and before the bringing of this suit paid the amount of said loss to the insurer, that being the full value of the cotton, the jury will find for the plaintiff-, and will assess their damages at the sums thus paid by them, with interest at the rate of six per
115 cent. per annum from the date of said payment until the present time. The defendant has pleaded that the policies of insurance mentioned in the complaint were void because the plaintiffs had not complied with the laws of this State. Upon the evidence this defense is not sustained, and on that issue the jury will find for the plaintiff.

116 On March 8, 1890, as follows:

Comes the defendant, by Dodge and Johnson, Esqrs., its attorneys, and presents to the court its bill of exceptions, which is examined by the court and found correct, and the same is signed, sealed, and made part of the record in this cause; and also comes said defendant, by its said attorneys, and files herein its citation and writ of error, which are allowed by the court.

Which bill of exceptions is in the words and figures, to wit:

In the United States Circuit Court for the Eastern District of Arkansas.

117 MARINE INSURANCE COMPANY OF LONDON
v.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Bill of Exceptions of Defendant.

Be it remembered that on the 7th day of February, 1890, the defendant filed its pleas of non-joinder in words as follows:

(The plea appears on pages 46, 47 of the transcript.)

And after argument said pleas were overruled by the court; to which ruling at the time defendant duly excepted, as appears by the judgment-roll herein.

Thereupon the defendant filed its demurrer to each of the paragraphs of the complaint as well as a general demurrer to the whole complaint, which demurrer is in words as follows:

(The demurrer appears on pages 44–46 of the transcript.)

118 And said demurrer was overruled by the court; to which ruling defendant duly at the time excepted, as appears by the judgment-roll herein, and now tenders its bill of exceptions.

Whereupon said defendant duly filed its answer to the amended and substituted complaint, which answer appears in the judgment-roll. Afterwards, a jury having been empannelled to try said cause, the plaintiff, to sustain the issues in said case in its behalf, offered the following evidence:

The plaintiff offered in evidence a policy of insurance issued by it as # 108, dated Nov. 12th, 1885, to T. F. Howell to cover all cotton "owned by the assured from the time of purchase at points in the United States to points therein or in Europe, direct or otherwise, with liberty to stop and stay at points and places, to transship, to

119 compress, and to lighter," dated New York, Nov. 12th, 1885.

It also introduced in evidence a written instrument attached to said policy in words as follows: "The interest in this policy is now vested in the Howell Cotton Company and T. F. Howell, Sept. 14th, 1887."

Plaintiff also introduced in evidence a policy of insurance issued by it as # 97, dated September 16th, 1886, to T. F. Howell & Co. to cover all cotton owned by the assured "from the time of purchase at points in the State of Arkansas until delivery at points in the United States or Europe, direct or otherwise, with liberty to stop or stay at points and places, to transship, to compress, and to lighter." It also introduced in evidence a written instrument attached to said policy, signed by the agent of plaintiff at New York September 9th, 1889, in words as follows: "The interest in this policy is now vested in the Howell Cotton Company and N. W. Taggert & Co. as interest may appear."

120 The plaintiff then read to the jury the following receipt:

"LITTLE ROCK, ARKANSAS, *December* 31*st*, 1887.

Received of Chubb & Son, of New York, agents for the Marine Insurance Company of London, seven thousand nine hundred and seventy-one dollars (7,971.00), being in full for the value of 185 bales of cotton burned in the cotton compress at Little Rock, Arkansas, on November 14th, 1887, which cotton was insured by said Marine Insurance Company, which sum is in full payment for all the interest held by us in said cotton.

(Signed) HOWELL COTTON COMPANY.
A. P. HOWELL, *M'g'r.*"

Plaintiff then read in evidence a policy of insurance issued by itself to R. E. Douglass & Co., covering all the interest of said R. E. Douglass & Co., and also Stark & Douglass, in cotton owned by them "from the time of purchase at points in the United States until delivery at points therein or in Europe, direct or other-
121 wise, with the liberty to stop and stay at points and places, to transship, to compress, and to lighter," said policy bearing date July 18, 1887.

The following receipt was then read in evidence:

"LITTLE ROCK, ARKANSAS, *January* 10*th*, 1888.

Received of Chubb & Son, of New York, agents for the Marine Insurance Company of London, England, three thousand nine hundred and ninety dollars and forty-seven cents (3,990.47), being in full for the value of 93 bales of cotton burned in the cotton compress at Little Rock, Arkansas, on November 14th, 1887, which cotton was insured by said Marine Insurance Company, which sum is a full payment for all the interest held by us in said cotton.

(Signed) R. E. DOUGLASS & CO."

Plaintiff then introduced the following witnesses, namely.

Plaintiff also proved that the payments mentioned in said
122 receipts were made and that the matters stated in said receipts were true.

Captain W. H. WRIGHT testified for plaintiff:

Q. Will you state what position you occupy now with reference to the Union Compress Company?

A. I am its president.

Q. What position did you occupy with reference to it in 1887?

A. President of the company.

Q. Will you state where, in 1887, November, the compress and compress sheds of the Union Compress Company were located?

A. The compress sheds were at the foot of Main street, in Little Rock, Arkansas; previously we had the compress located there. It was moved, I believe, in September to the eastern portion of the city.

Q. At the time of the fire, in November, had the compress machinery been removed from the foot of Main street?

A. Yes, sir.

Q. Now, then, how long did you continue to compress cot-
123 ton at the foot of Main street?

A. We quit the previous season in May or June.

Q. When was that compress shed located at the foot of Main street; do you know?

A. In 1884, I believe.

Q. What was it then, the Union Compress Company?

A. It was the property at the time of the Little Rock Oil and Compress Company.

Q. What was the business of that company?

A. The compress department was the compression of cotton.

Q. Did it have any other place for compression except there?

A. Also at Argenta.

Q. When was that erected at Argenta?

A. In 1881 or 1882; I think 1882 was the first year.

Q. Will you state the method of compressing cotton, whether or not the cotton that was received at the foot of Main street when it was the property of the oil and compress company was com-
124 pressed at that place, or whether it was received there and moved to Argenta for compression, or whether the cotton that was received at Argenta was compressed there and the cotton received here was compressed here?

A. We received cotton at the foot of Main street for transshipment to Argenta. That was before the compress was built at the foot of Main street.

Q. Now, what arrangement existed between the railroad company and the compress company with reference to the transshipment of cotton from the foot of Main street to Argenta?

A. My recollection is that the railroad company transported the cotton from Main street to Argenta free.

Q. Transported it free?

A. Yes, sir.

Q. Now, that was for two years previous to 1884, when you located the compress machinery there?

A. We constructed a compress in 1884 at the foot of Main street.

125 Q. Now, then, after you constructed the compress at the foot of Main street did you continue to carry cotton from there over to Argenta?

A. It was received and compressed there.

Q. How long did that arrangement continue to exist?

A. Three years, from 1884 to 1887.

Q. What was done with the cotton after it was compressed?

A. It was taken in charge by the railway company.

Q. Who paid for the compressing of it?

A. The railroad company.

Q. Captain Wright, if you remember, was it the custom of the

railroad company to issue b. l. for cotton previous to compression or subsequent to compression?

A. Previous to compression.

Q. Who made that arrangement with the railway company, do you know?

A. The arrangement was originally made by Mr. Urquhart, who was president of the Little Rock Oil and Compress Company,

126 with the officials of the Iron Mountain railway in St. Louis.

Q. Then, if I understand you, the cotton was billed before compression and compressed at that point at the expense of the railroad and by them loaded into the car and carried off?

A. We had nothing to do with the billing, except as we were instructed by the owners of the cotton.

Q. Did you have a receiving clerk there at that time?

A. Yes, sir; we had a receiving clerk there.

Q. Did the defendant in this case pay any portion of that receiving clerk's salary? Now, that is previous to the removal of the compress machinery.

A. There were two clerks.

Q. You mean on this side of the river?

A. Yes, sir; I mean on this side of the river previous to the time that the machinery was removed. *A.* There was a receiving and a shipping clerk.

Q. Who was the shipping clerk in the employ of?

127 A. The shipping clerk was paid by the railroad and ourselves jointly.

Q. Now, where was the machinery from the foot of Main street moved to?

A. The present grounds belonging to the Union Compress Company in the eastern portion of the city.

Q. What arrangement was made then with the railroad company, if any, with reference to the moving of cotton?

A. I don't understand you exactly.

Q. When the machinery was moved to the eastern portion of the city, was any arrangement made with the railroad by which the cotton was to be shipped from Little Rock to either of the compresses of the company?

A. Yes; an arrangement was made to transport the cotton to its compress in Argenta from the foot of Main street, until such time as the other compress would be in operation.

Q. Now, was that the same arrangement or a different

128 arrangement which had been entered into previous to the erection of the machinery at the foot of Main street?

A. I think it was a different arrangement. There were different officials in charge of the road. Mr. Newman succeeded to the previous traffic manager, and he insisted upon two dollars per car.

Q. Who was to pay that?

A. The compress company.

Q. In 1887, do you remember the time of the fire?

A. 14th day of November, 1887; yes, sir.

Q. How many bales of cotton were in the sheds of the compress company at the foot of Main street at that time?

A. I think there was 3,600 to 4,000 bales. I do not remember exactly.

Q. At the time of the fire you state that there was from 3,600 to 4,000 bales of cotton in the compress sheds?

A. Yes, sir.

129 Q. Do you know what amount of this was billed and what amount was unbilled?

A. I think from 2,600 to 2,800 or 3,000 bales were billed. I do not remember exactly.

Q. Will you state to the jury the exact manner of doing business between the compress company and the railway company with reference to the shipment of cotton—when and how it was shipped?

A. We shipped it at the order of the railway company.

Q. Well, just state how these orders were given, please.

A. Issued by the general freight agent or assistant general freight agent at this point.

Q. And was given to the owner of that cotton when it was received by the Union Compress Company?

A. A ticket of the Union Compress Company (ticket shown to witness); yes, sir; that is one of the tickets.

(This ticket was read in evidence:)

LITTLE ROCK, ARK., *Oct.* 22, 1887.

Received by Union Compress Company—

130 From —— ——.

Account of Howell Cotton Company.

For compression.

Storage after ten days will be charged.

Not responsible for any loss by fire.

Marks.	No. bales cotton.
B D O.	(2) two.

G. G. WALKER (2).

Q. Now, what was done with that ticket by the holder of it in order to get shipment?

A. Took it to the railroads, to the delivery agent of the railroads, who made an order on us for the shipment of that cotton after issuing the b. l. for the cotton. Then we would issue the cotton upon receipt of this notice from the railroad company, after they issued a b. l. The order issued to us by the railway companies was an order directing us to compress the cotton, after having informed us that they had issued bills of lading, and a further order to

131 load it on the cars. This order was issued to us both by the St. Louis, Iron Mountain and Southern Railway Company

and the Memphis and Little Rock Railroad Company and referred to cotton upon which each of those companies had issued bills of lading for cotton both at the compress warehouse, at the foot of Main street, and at the compress in Argenta, across the river. The other reads as follows:

UNION COMPRESS COMPANY,
LITTLE ROCK, ARK., 9, 11, 1887.

I have this day issued on your dray receipts b. l. to John Smith & Co. for 100 bales cotton.

Marks.	No. bales.	Weight.
A B C.	100	50,000

Ship the above cotton by the St. Louis, Iron Mountain and Southern railway via St. Louis, for account of—

A. R. BRAGG, *Agent.*

Q. Now, Captain Wright, you state that there was from 26 to 2,800 or 3,000 bales of cotton which had been billed. How
132 long had it remained there? Do you remember?

A. I think some of it was there as long as six weeks or two months.

(Mr. JOHNSON:) Testify what you know, Captain Wright.

A. That is my recollection. I feel sure that some of it was there six weeks.

Q. Will you now describe to the jury how the compress grounds were situated or located (I expect that Captain had better make a diagram on this paper)?

A. At the foot of Main street, three blocks on the west side and four on the east side, taking in the street and the lots between those ten blocks. The depth of the warehouse proper was one lot, say 150 feet. There were three lots on the west side and four on the east side, making seven lots of ground; half of the lots of the west side excavated for the machinery, compress boiler, and so on.

Q. How near was the railway track? Describe to the jury how near the railway track ran to the compress shed.

133 A. What was known as the compress siding was within 18 inches of our platform, on a level with the car door. The main track was some four or five feet distance north. I do not know the exact distance, what is usual, I suppose, between sidings and main line.

Q. Was demand made on the railway company for shipping facilities for that cotton?

A. Yes, sir.

Q. By whom and how often? State the circumstances.

A. The demand was made repeatedly upon all the officials we

knew here, and also at St. Louis; also to the traffic manager for transportation for the cotton.

Q. Who made it?

A. I made it.

Q. How often?

A. I cannot say except to say that I made it repeatedly and sent our compress superintendent to the local superintendent here.

Q. Was the cotton in an exposed condition at the time of the fire?

134 A. The cotton was in the same condition that it had been for a year—that is, for that season of the year. The cotton was piled up there at some distance from the railroad track.

Q. What was the character of the weather?

A. The weather was exceedingly dry.

Q. For how long?

A. It was a very dry season. I remember that it was remarked by everybody that it was unprecedent-ly dry.

Q. Captain, we would like to have something definite about the time you made these demands. How long previous to the fire?

A. Well, the demands were made often. I telegraphed a long telegram to Mr. Newman.

Q. Who was Mr. Newman?

A. He was general traffic manager and third vice-president of the road; and on one occasion the managers of the road were here and saw the condition of the cotton.

135 Q. Now, can you locate something near the time when they were here? How long previous to the fire, about?

A. I was in St. Louis on the 8th day of November. If I remember, I returned from St. Louis on November 8th, where I went to impress upon the officials of the road the condition we were in here in regard to the transportation of cotton. I think I left here about the 6th and back on the 8th.

Q. Now, you have not told us how long you had been demanding and how long there had been a necessity for a demand for transportation previous to this time. You say you had been sending telegrams?

A. I suppose the correspondence would cover two months or more. I cannot give date exactly unless I should refer to the correspondence. I know the accumulation of cotton that season was quite early. It came in unusually early.

136 Q. Captain Wright, will you state what understanding there was as to the delivery of cotton at that point with the cotton buyers or shippers—whether it was known to the public as a place for the shipment and receiving of cotton for shipment?

A. Yes, sir; it was known to the buyers as such.

Q. About how many bales were shipped from there; do you know or can you approximate?

A. I have forgotten that. It is a matter of record, and can be ascertained. I have forgotten the quantity of cotton received.

Q. You can ascertain. I wish you would, please.

Q. What use was made of the space between the lots there at the foot of Main street?

A. We had a lease from the city for the purpose of storing or placing cotton on it.

Q. Was cotton stored in there at the time of the fire?

A. Not stored there; it was placed there.

137 Q. In the street?

A. Yes, sir.

Q. About what quantity?

A. As much as the street would hold except the gangway.

Q. What gangway?

A. There was a gangway left for people crossing to the Athletic Association and a gangway, I think, next to the compress for moving the cotton.

Q. What access was there to the river except through that gangway?

A. There was none.

Q. What was the width of that gangway?

A. Four or five feet.

Q. Captain, one more point before I close your testimony, and that is with reference to the contract between the railroad company and the compress company. Now, I want to understand that. What was the agreement between the two companies with reference to the furnishing of transportation; how and when and upon whose demand was it furnished?

138 A. The transportation was to be furnished when it was needed. They were to furnish the transportation necessary to carry off all cotton that was put there.

Q. Captain Wright, we will close now with the understanding that you will get us the statement of the cotton that was shipped, please.

A. That is, the cotton we had received?

Q. Yes, sir.

(Item never furnished.)

Cross-examination:

Q. What company was it that was occupying this warehouse at the foot of Main street at the time of the fire?

A. Union Compress Company.

Q. The fire occurred the 14th day of November, didn't it?

A. Yes, sir.

Q. How long had the Union Compress been in existence at that time?

A. Since June 22d.

Q. That company, then, was organized on the 22d of June, 1887?

139 A. Either on the 6th or 22d. It is my recollection that it was on the 22d.

Q. And was constructing at the time this fire occurred a compress in the eastern portion of Little Rock?

A. Yes, sir.

Q. Who made the arrangement with the railroad company on the part of the compress company for transportation rates.

A. Mr. Howell made that arrangement in St. Louis in September.

Q. Where did he make the arrangement?

A. In St. Louis.

Q. Were you present at the time?

A. I was not.

Q. Did Mr. Howell make that arrangement?

A. Yes, sir; with Mr. Newman.

Q. Who was in possession and control of the warehouse and cotton stored at the foot of Main street?

A. The Union Compress Company.

Q. You say the Union Compress Company had control
140 and possession of this ground?

A. Yes, sir.

Q. Who was in immediate charge of the ground representing the Union Compress Company?

A. Mr. Bland was superintendent of the company at that time; he had charge of both sides of the river.

Q. Who occupied the cotton shed immediately east of Main street?

A. Union Compress Company.

Q. I want you to state how far down the river going east from Main street the cotton storage continued.

A. Four blocks—I mean four lots 150 feet each.

Q. Was their cotton stored immediately across Scott street?

A. I think the whole street was covered with cotton.

Q. Did not continue across east of Scott street?

A. I think there was cotton stored up to Elm street east and down Elm street. I am not sure about it; it is all a matter of recollection.

141 Q. Where is Elm street?

A. Elm street is a street running parallel with Markham street.

Q. Captain Wright, did the railroad company have any control of the sheds and of the cotton that was stored at the foot of Main street?

A. They had no direct control of the shed, but they had control of the cotton.

Q. In what way did they have control of it?

A. Cotton on which bills of lading were issued.

Q. Was it in their possession or in the possession of the compress company?

A. The possession of the compress company for the railway company.

Q. What was the condition of the cotton bills of lading were not issued for?

A. It was under the control of the owner.

Q. But it was in the possession of the compress company, wasn't it?

A. We had it for the compress company, for the owners.

Q. Now, I was going to call your attention to what you said a moment ago with reference to making up lots of cotton by
142 the cotton-buyers. You said they sometimes waited a few days until the cotton-buyer had made up his lot, such a quanity such as he wanted to send off. He would let some of it lie at your sheds, would he?

A. Yes, sir.

Q. And would not get his b. l. until he had made up the lot he wanted to ship out?

A. Yes; that was a matter of common custom.

Q. Now, the cotton was not ready for shipment until the lot had been made up?

A. That was the manner; then the railroad company transported it over to Argenta at two dollars per car. They charged us two dollars per car for their services.

Q. Did you have any other compress than the one that was at Argenta in operation at that time?

A. No, sir.

Q. It was not until later that your compress was in opera-
143 tion in eastern Little Rock?

A. Yes; I think we commenced receiving cotton about the 7th or 8th of November; about one week before the fire.

Q. You state that there was an unusual and unprecedented season and unprecedented crowding of cotton that season?

A. Yes, sir.

Q. Did cotton come much earlier than usual at this season?

A. Yes, sir.

Q. On account of the character of the weather, I suppose?

A. Yes, sir.

Q. About how much earlier was the crop than usual?

A. I think there was a lot of cotton here in August.

Q. Did you have any other space for stowing cotton in the city besides that?

A. No, sir.

Q. Cotton-buyers, when they bought their lots of cotton, were accustomed to come and store it with you at that place?

144 A. Yes, sir.

Q. What was the condition of your compress at Argenta?

A. In what way?

Q. Was it crowded with cotton over there?

A. Yes, sir.

Q. Did any other road besides the I. M. road pursue this same course of business with you?

A. Yes, sir.

Q. What other road?

A. Memphis and Little Rock.

Q. Cotton-buyers would pursue the same course with their compress receipts?

A. Yes, sir.

Q. And that cotton would be held until carried out by the I. M. railway over to the compress at Argenta?

A. Yes, sir; and delivered to the Memphis road for shipment to its destination at Argenta.

Q. Who loaded the cotton on the cars at your warehouse?

A. The Union Compress Company.

145 Q. Who unloaded them at Argenta?

A. The Union Compress Company.

Q. And who loaded it for final shipment?

A. The Union Compress Company.

Q. Did the Little Rock and Memphis road pay you in the same way and at the same rate for compressing the cotton that the I. M. did?

A. Yes, sir.

Q. What was the manner of doing business as to the loading of cars—was there a side track down there?

A. Yes, sir; there was a side track.

Q. Could you tell me the number of employees you kept at the shed?

A. No, sir; not without referring to the pay-rolls.

Redirect:

Q. You say you were not present when the contract was made with the railroad company. From whom did you get your information?

A. Mr. Howell.

146 Q. Now, what contract had existed previous to that time, or rather what do you know of the contract that existed previous to that time? Did you know of the contract with the railroad?

A. Yes, sir; the contract was the same.

Q. You are asked that if the compress was crowded at that time will you state whether or not the compress capacity was sufficient to have compressed what cotton was on hand and relieve this state of blockade down there?

A. Yes, sir.

Q. Was sufficient?

A. It was sufficient.

Q. Upon that point do you remember up to what date the railroad company issued bills of lading? Did they refuse to receive any cotton at this compress shed?

A. No, sir; they never did.

Q. You say up to the date of the fire?

A. I think they issued bills of lading on the very date of the fire; that is my recollection.

147 Q. Captain, I don't know whether we understand you or not. We understood you to say that tickets were given to the owner, and when he presented them to the railroad company bills of lading were issued upon them, and upon that fact

could you take out insurance for the benefit of the railroad company at once?

A. Yes, sir; at once.

Q. Now, if I understand you, on cross-examination you stated that cotton was piled continuously from the east end of the compress ground on down east of Scott street; was it?

A. Yes; cotton was piled from one end to the other.

Q. But did other parties have cotton piled along down north of Elm street?

A. I think there was cotton piled along Elm street. I cannot answer sure; but at that time cotton was piled about considerably.

Q. Did the railroad have any other place in Little Rock for the reception of cotton except this ground?

A. Yes, sir.

Q. Where?

A. They have freight depot, and I also think they had at
148 that time; also at the foot of Rock street, near the bridge.

Q. They had a depot?

A. I do not know that any cotton was received up there, but it may have been.

Q. Do you know what amount was received at the other place?

A. No, sir; I don't.

Q. And you do not know that there was any received at Cumberland street?

A. No, sir.

Q. Here is a plan; look at it and see if it is right.

A. Yes, sir; this is a correct plan and describes the place held and owned by the Union Compress Company, which was in its charge and control at the time of the fire. (The following plan of the *locus in quo* was then introduced in evidence and shown to the jury, viz:)

(Here follows diagram marked page 149.)

150 Q. Now, Captain Wright, on this diagram you can explain to the jury. I understand that to be Main street, running down to the river.

A. Yes, sir.

Q. Cotton was piled on Main street here?

A. Yes, sir (designating the foot of Main street).

A. P. HOWELL testifies for plaintiff:

Q. Mr. Howell, state where you live, please.

A. Live in Little Rock.

Q. How long have you been living here?

A. Ten years.

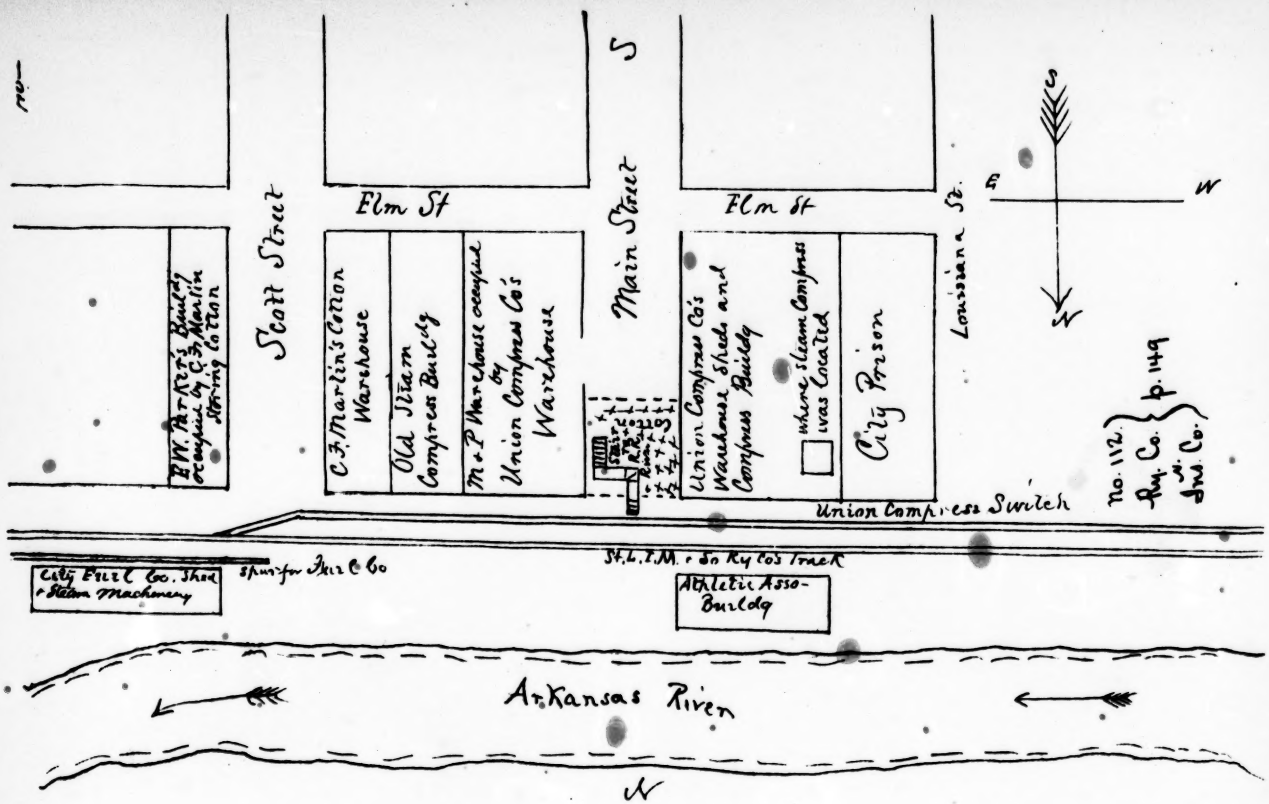
Q. What business have you been engaged in during that time?

A. Cotton-buying.

Q. What business are you engaged in now?

A. Cotton-buying still.

Q. What is the name of your firm?



Scott Street
Elm St
Main Street
Elm St
Louisiana St.
S
E
W
N
E.W. Parker's Buildg occupied by C.F. Martin Storing Cotton
C.F. Martin's Cotton Warehouse
Old Steam Compress Buildg
M & P Warehouse occupied by Union Compress Co's Warehouse
Union Compress Co's Warehouse Sheds and Compress Buildg
where steam Compress was Located
City Prison
Union Compress Switch
No. 112. Ry. Co. Ins. Co. } p. 149
St. L. I. M. & So Ry Co's Track
City Fuel Co. Shed & Steam Machinery
Spur for Fuel Co
Athletic Asso-Buildg
Arkansas River
N

A. Howell Cotton Company now.

Q. Look at that receipt. Is that your signature?

A. Yes, sir.

151 Q. Does that refer to the cotton that was insured by the Marine Insurance Company in controversy now?

A. Yes, sir.

Q. Are you acquainted with the signature of R. E. Douglass & Co.?

A. Yes, sir.

Q. Is that their signature?

A. Yes, sir.

Q. Mr. Howell, did you at any time have any connection with the Union Compress Company?

A. Yes, sir.

Q. Were you an agent of that company?

A. Yes, sir. I was director at the time of the fire.

Q. How long had you been a director of that company?

A. Since June, 1887.

Q. That was at the time it was organized, was it?

A. Yes, sir.

Q. Do you know anything of the contract between the Union Compress Company and the St. Louis, Iron Mountain and

152 Southern Railway Company for the transportation of cotton from Little Rock to Argenta for the purpose of compression?

A. Yes, sir.

Q. State what that contract was and when it was made as nearly as you can remember.

A. Well, I went to St. Louis in 1887, and it was virtually a renewing an old contract that the Little Rock Oil Company had had with them. The agreement was that the compress company would pay the railroad two dollars per car for transporting the cotton from Little Rock to the Argenta compress.

Q. Was the railroad company to transport all the cotton received at the compress at that rate?

A. Yes, sir; until otherwise agreed upon.

Q. Had you been connected before that time with the Little Rock Oil Company?

A. No, sir.

Q. You had not?

A. No, sir.

153 Q. How long had that contract been acted upon by the railroad company and the compress company at the time the fire took place?

A. Well, the arrangement was made with the railroad company in the early part of September—I do not remember the date—and the fire occurred on November 14th.

Q. And during that time had the railway received cotton and transported it to Argenta, at your sheds?

A. Yes, sir.

Q. Did they transport the cotton from your sheds to Argenta as fast as it arrived there?

A. Well, no, sir; the cotton laid there some time. They were moving all the time, and the cotton was not always carried to the car as soon as it went to the shed.

Q. Had there been any remonstrance made by the compress company to the officers of the railroad company on account of the
154 delay in transporting the cotton under their contract?

A. Yes, sir.

Q. Who was that made by?

A. By Captain Wright, mostly. He was in charge of the compress.

Q. Did you have any communication with the officers of the road about that?

A. I did not personally. Captain Wright did most of the time.

Q. Did he go to St. Louis to see some of the parties there about it?

A. No, sir.

Q. Do you know that there had been complaint made to the officers of the company in regard to this delay in moving the cotton?

A. Yes, sir.

Q. You know that it had been done?

A. Yes, sir.

Q. You stated, Mr. Howell, I believe, that the contract that you made on behalf of the Union Compress Company with the
155 railway company was a continuation of the old contract which had been in force between the Little Rock Oil Company and the railway company?

A. Yes, sir.

Q. Was there not a reduction—a slight reduction—in charge made by you—15 cents to 13 cents?

A. No, sir; not at that time.

Q. When was that made?

A. I think the season before.

Q. The season before?

A. I think it was. I am not sure about that.

Q. Who did you make your contract with?

A. Mr. Newman.

Q. What office did he hold in the railroad company at that time?

A. I think he was general traffic manager.

Q. Where did you make that contract?

A. I think it was in the Southern hotel at St. Louis.

Q. Did you go for the purpose of making the contract?

A. Yes, sir.

Cross-examination:

Q. A contract existed and agreement with the railroad
156 company to charge $2 per car?

A. Yes, sir.

Q. From Little Rock to Argenta?

A. Yes, sir.

Q. That contract was verbal, it was not in writing?

A. No, sir.

Q. No time specified in which the cotton was to be shipped?
A. No, sir.
Q. Did that apply to all cotton that was received by the compress company at its warehouse?
A. Well, nothing particular said about that.
Q. Did that apply to the cotton to be shipped by any road?
A. Yes, sir; the Iron Mountain road was to do the hauling.
Q. It applied, then, to all the cotton to be shipped to the Argenta compress?
A. Yes, sir.
Q. You state that the cotton was not always ready to go to the compress as soon as it was delivered at the warehouse. Why was that?

157 A. Well, the buyers did not have lots completed and they accumulated until they completed their lot, and until then the cotton could not be shipped to the compress, at least it was not understood that it was to be shipped.

Q. It was not the usage?
A. No, sir.
Q. Now, do you know whether there was a good deal of cotton there for which bills of lading had not been issued?
A. Doubtless there was considerable.
Q. About how much?
A. I could not say, Mr. Moore.
Q. Was there not as much as ⅔ of the cotton not billed at the time of the fire?
A. I do not know, but I think there was about ½ of it.
Q. What was the character of the season in regard to bringing in cotton; how about the market?
A. Very early.

Q. What effect did you think that the fact of its being
158 an early season had on the bringing in and hauling of cotton?

A. Well, I do not know; the cotton came in much earlier than usual. It seemed crowded and blocked all over the country. It came ahead of time.
Q. Was there any serious trouble at this place during the season before that?
A. I don't think so; a little, but not much.
Q. You say it was general throughout the country?
A. Yes, sir; from what I heard.
Q. How long have you been in the cotton business, Mr. Howell?
A. About 12 years.
Q. At this place the most of the time?
A. No, sir; about 10 years here.
Q. I wish you would state how that season compared with other seasons during your experience here.

(Objected to by Judge Rose.) Objection overruled.

A. Well, I think the cotton began to come in about three
159 weeks earlier than usual, and we seemed to have a very dry

summer. It came very rapidly; seemed blocked up everywhere; the whole country was blocked everywhere; complaint of railroad being short of cars and everything.

Q. It was unexpected and therefore unprovided for to some extent?

A. Yes, sir.

Q. Have you known any such rush since?

A. No, sir.

Q. What time is the cotton generally gathered in ordinary seasons?

A. Generally by the first of January.

Q. Do you mean gathered by the first of January in ordinary seasons?

A. Yes, sir.

Q. By what time was it gathered during that season?

A. Well, I think about the first of January.

Q. Wasn't it much earlier that season than usual?

A. Well, I don't remember just about that.

160 Q. Isn't it a fact, Mr. Howell, cotton is not usually gathered until about February?

A. They are generally through picking by the first of January.

Q. I mean, Mr. Howell, brought in the market, by what time do they generally get cotton in the market?

A. The bulk of it is generally in by that date.

(Shows ticket to witness.)

Q. Are these the warehouse receipts for the cotton that you had insured?

A. I think they are. These tickets were the receipts given us by the Union Compress Company as warehouse receipts and we held them as against the compress company.

The ticket reads as follows:

LITTLE ROCK, ARK., *Oct.* 22, 1887.

Received by Union Compress Co.
From Howell & Co.
Account of Howell Cotton Co.
For compression.
Storage after ten days will be charged.
Not responsible for any loss by fire.

Marks.	No. bales cotton.

161 Q. No bills of lading had been issued for this cotton?

A. No, sir.

Q. In charge of the compress for you?

A. Yes, sir.

(Mr. MOORE: I want to call the attention of the jury to the fact that no bills of lading had been issued for cotton sent in from time to time by Howell & Co.)

Q. For what purpose was you leaving this cotton at the warehouse, Mr. Howell?

A. That?

Q. Yes, sir.

A. Well, it was a little cotton that had not been placed, and the lot was not completed.

Q. Not ready for shipment, was it?

A. No, sir.

Q. It was not in a condition that cotton was usually in when the company sent it over the river to the compress?

A. No, sir; if I remember right, it was a little staple cotton,
162 setting it aside to get the thing completed.

Q. According to the usage of the compress company this cotton was not ready to go over to the compress at Argenta until you got your lot made out; this is the fact, isn't it?

A. Yes, sir.

Q. Mr. Howell, were you a director and member of that compress company?

A. Yes, sir.

Q. Who was in charge of the ground down there at the foot of Main street, what you call the cotton shed of the compress company?

A. Why, I think Mr. Bland was superintendent at that time.

Q. For whom?

A. For the compress company.

Q. And the compress company was in possession of the grounds?

A. Yes, sir.

Q. Did Mr. Bland represent the compress company?

A. Yes, sir.

(Objected to by Judge Rose.)

Q. Mr. Howell, were you familiar with the condition of the cotton shed at the time you deposited the cotton there?

A. At the time I sent my cotton there.

163 Q. The cotton that is represented by these tickets, was it not deposited there?

A. Yes, sir.

Q. Did these companies insure it at that point?

A. Which company?

Q. The companies who issued the policies.

A. The policy covered the cotton anywhere in the State.

R. E. DOUGLASS testified for plaintiff:

Q. Mr. Douglass, you live here in town, I believe?

A. Yes, sir.

Q. In the cotton business?

A. Yes, sir.

Q. Have been for a long while?
A. For about seven years.
Q. What is the name of your firm?
A. R. E. Douglass & Co.
Q. Just look at that receipt and state whether it was signed by your firm.
A. Yes, sir; I signed it myself.
Q. That represents the real transaction, does it?
164 A. Yes, sir.
Q. Mr. Douglass, did you have any connection with the Union Compress Company in 1887?
A. Well, I was a stockholder in the Union Compress Company, which succeeded the Little Rock Compress Company.
Q. That was organized in June of that year, I believe.
A. I think it was.
Q. Were you a director also?
A. No, sir.
Q. Do you know anything about the accumulation of cotton there that fall?
A. Well, yes; there was considerable cotton accumulated during the month of November and possibly before that time.
Q. What time did the cotton begin to form and blockade there?
A. Really, I do not remember; suppose more or less for a month, possibly.
Q. Were the sheds full at the time the fire took place?
A. I think it was; yes, sir.
Q. Some of the cotton piled outside?
165 A. The street, with the exception of the sidewalk, was full, I think, up close to the alley.
Q. Piled up, was it?
A. It was not tiered up. I think most possibly that some of it was headed up and some of it lay on its edge.
Q. Sidewalks open on both sides?
A. Sidewalks were open on the east side, and I think there was a gangway four or five or six feet or something like that on the west side. I do not remember positively.
Q. On the east side there was a passage?
A. I suppose there was a sidewalk passage. I do not remember positively.
Q. Going down Main street on the sidewalk there were some steps?
A. Yes, sir.
Q. And then some more going down to the railroad?
A. Yes, sir.
Q. Where was the cotton piled on the south side?
A. It was on the south side of those steps; yes. Where the
166 head of the steps were I think was clear, but it was piled on the south and west.
Q. Wasn't there cotton on the east side there, too?
A. Doubtless.
Q. Wasn't there cotton on the sidewalk?

A. I do not know about that.

Q. Who was it that was occupying that ground over there at the time of the fire, west of Main street?

A. I suppose it was the compress company.

Q. The compress company had cotton on both sides of the street?

A. Yes, sir.

Q. And also on the west side?

A. East and west.

Q. How wide was that street?

A. Thirty feet wide.

Q. What was the shed made of?

A. The shed on the right-hand side—east side—was a brick wall, possibly twelve or fourteen feet high, and there was an office building, I suppose about fifteen or twenty by thirty or forty feet, at the southwest corner. It was open with the exception of towards
167 the railroad. The most of it was open space.

Q. Now, there was cotton piled down here where the machinery had been, was there not?

A. No, sir; the machinery was in an old shed immediately east of this warehouse, and I don't think that was used. This was used for cotton all the time.

Q. That would be right there, then (pointing), would it?

A. Yes, sir.

Q. What were the floors here made of?

A. I think it was what you call about two by four.

Q. I mean—wood?

A. Wood, I think.

Q. How many floors—one or two?

A. I don't know, sir.

Q. Had they laid planks out over there where that cotton was placed in the street?

A. In the street I think a good deal of it was planked up; I think it had to be.

168 Q. Was there a rail on the crossing in there?

A. I don't know; I don't remember positively.

Q. Were these steps that you speak of, going down to the railroad across to the boat-house, of wood or metal?

A. They were of wood.

(ROSE:)

Q. Some of these receipts are given on the new blanks of the Union Compress Company and some of them on the old blanks of the Little Rock Oil and Compress Company. How did that happen?

A. I suppose they did not have enough tickets and had these old ones on hand, possibly. (Tickets considered in evidence.)

Cross-examination:

Q. Mr. Douglass, were you familiar with the condition of the cotton shed?

A. I saw it every few days; I saw it daily.

Q. These are the receipts that show the dates of delivery from October sixth to October twenty-fifth. How came you to let
169 this cotton accumulate there?

A. In getting up cotton here we probably had some cotton that was not regular and occasionally some extra staple cotton, something entirely different from the cotton that we had orders for; we sent it all in and let the compress company kick about it.

Q. Why did the compress company kick about it, Mr. Douglass?

A. Well, they did not want to do any storage business.

Q. They objected to holding it so long, did they?

A. Yes, sir.

Q. And you could not ship it very well until you got your lots made up to meet your orders?

A. No, sir; but of course while there was some of this cotton the large majority would have been billed in a day or two.

Q. You mean would have been billed within a day or two after the fire?

A. Yes, sir.

170 Q. Mr. Douglass, do you know of your own knowledge how much unbilled cotton there was there?

A. No, sir; I do not.

Q. Have you no knowledge about that?

A. No; I have not.

(JOHNSON:)

Q. You know there had been a large amount of cotton unbilled?

A. Yes, sir.

Q. Do you remember what rate of premium you paid on this cotton?

(Objected to by Rose, for plaintiff. The objection was sustained and the defendant, by its counsel, then and there duly saved its exceptions.)

SAM. O. SMITH testified for plaintiff:

Q. Were you here in 1887 at the burning of the compress shed?

A. No, sir.

Q. Were you living here at that time?

A. Yes, sir.

Q. How long had you been away?

A. I left Saturday.

Q. Mr. Smith, what relation did you bear to the compress company at that period?

171 A. I was director and secretary.

Q. What was the condition of the cotton at the compress shed at the date of the fire; did you know it?

A. I cannot say on the exact day of the fire, sir.

Q. Well, the Saturday before.

A. It was in a very crowded condition.

Q. For what length of time had it been in that condition?

A. Well, it had been crowded there for six weeks.

Q. Do you know whether or not any demand had been made for shipping facilities?

A. Yes; demand had been made.

Q. How often?

A. I cannot say; it was done through the president. I know it was done repeatedly.

Q. Do you know how many bales there were at the shed at that time?

A. In the street and in both sheds there were about 3,600 bales.

Q. Do you know how much of that was billed and how much unbilled?

172 A. There were 2,692 bales billed, as we decided after considerable checking of it; that is my recollection of the figures.

Q. How was that cotton stored? What was the storage capacity of the compress for receiving or taking care of cotton?

A. Well, this cotton was stored in both stories of the sheds on the west side of Main street and in Main street and in the warehouse, containing lots 210 feet in length, I believe, and also in two-story platform and shed immediately north of the warehouse, east of Main street, occupying all the space that the company had control of.

Q. Do you know how long that cotton had been there?

A. What cotton?

Q. The cotton that burned.

A. No, sir; cotton was being received and shipped out daily. I could not say without referring to the books.

Q. Will you please state to the jury the method of carrying
173 on business between the railroad and the compress company with reference to the cotton and who was the managing party that received the order if any order was given to the railroad company to ship it?

A. Well, the method of doing business there was about this, if I understand your question correctly: When cotton was received there a memorandum receipt was issued by the compress company to the transfer; the transfer company took that receipt to the owner of the cotton. When the owner of the cotton desired b. l. he took such receipts that he desired to be kept out to the railroad company and obtained b. l., notifying the compress company that they had so issued the b. l. and to compress it.

Q. Now, was there anything else they were to do besides compress it?

A. Who, the railroad company?

Q. No, sir; the compress company.

A. No; that was their business, compressing.

174 Q. Did they take out insurance?

A. Yes.

Q. For whose benefit?

A. For the benefit of the railroad.

Q. How long had this been a receiving place for cotton?

A. Up to the time of the fire?

Q. Yes.

A. Yes; I think five or six years.

Q. What was the general understanding with cotton buyers and shippers with reference to that being a receiving place?

A. Well, no understanding, with the exception that if they delivered their cotton there they were to get compress receipts on it, on which they could get bills of lading whenever desired.

Q. Was any cotton delivered there except for compression and shipment?

A. That I cannot say.

Q. There was this understanding, however?

A. What time do you refer to—the day of the fire?

Q. Yes.

A. You will understand that about six weeks previous to
175 the fire we were in a very crowded condition. We had a registry system with parties who desired to get cotton into the shed, so that they would have to register the marks and number of bales, and also there was an agreement that no cotton should be sent there except that was ready for immediate shipment, and when it was sent there that was about the understanding of it.

Q. Do you know anything about the contract between the railroad company and the compress company with reference to the shipment of cotton?

A. With reference to the shipment of cotton?

Q. Yes, sir; transshipment to the other side.

A. There was a contract or agreement between the Union Compress Company and the St. Louis, Iron Mountain and Southern Railway Company to transship cotton, being loaded and unloaded by the Union Compress Company for two (2) dollars per car
176 from that shed to the Argenta compress.

Q. The railroad company was to get two dollars for the use of their cars?

A. Yes.

Q. What was the compress company to get for their labor?

A. Thirteen cents per one hundred pounds for compression.

Q. Alone for compression or for handling?

A. The expense incident to compression. We charged the expense of the two dollars per car; was a part of our expense of conducting the business. Our gross revenue was thirteen cents per one hundred pounds on the cotton.

Q. Do you know anything about whether there were any other places or points for receiving cotton for shipment by the Iron Mountain road in this city?

A. Well, not as a general thing. They had received some down at the depot near the bridge.

Q. How many bales?

A. I only personally know of fifty bales shipped by our firm.
177 Q. Do you know whether that was by special arrangement or not?

A. It was by special arrangement.

Q. Do you remember how many bales of cotton were shipped from that shed during the season up to the time of the fire?

A. No, sir; I don't.

Q. Do you know about how many, Mr. Smith? Will your books show it?

A. The compress books will show it.

Q. Have you got access to them, so that you can get that amount?

A. Yes—that is, the president can give you the information. I think he has a daily report showing the total received there.

Q. We can get that?

A. Yes.

Cross-examination:

Q. You stated awhile ago that it was the understanding of cotton-buyers that they were not to send the cotton there until it was ready for shipment. I find by looking over the receipts of the com-
178 press company for the cotton in controversy in this case that it was delivered more than a month before the fire occurred. Can you explain how it was that it accumulated to such an extent with that agreement in existence that you refer to?

A. Well, the agreement was not carried out by the buyer.

Q. They had some cotton that they wanted to go, and it all went in together, did it?

A. Yes.

Q. That understanding was violated?

A. Yes.

Q. Now, these bills of lading, to go back a little, the owner of the cotton, you say, would take it to the compress, surrender it, and get his receipt?

A. Yes; the transfer company would.

Q. Now, it was customary for the owners of the cotton to take that b. l. and insure that cotton themselves?

A. Yes; when the b. l. was issued.

179 Q. Who was in charge of the shed and ground there, Mr. Smith?

A. Superintendent, Mr. Bland.

Q. Did the railroad company have any control or possession there?

A. No, sir.

Q. They had no right to go there and direct how matters should be conducted?

A. No, sir.

Q. You were asked awhile ago about the crowded condition of the compress in the fall of 1887. I wish you would state to the jury all the causes which contributed to produce the blockade that season, whether there was anything besides the alleged shortness of transportation.

A. In the season of 1887 the cotton crop came from three weeks to a month previous to any year, and the movement was very rapid and very large. The month of September received 650 thousand bales of cotton as against 350 thousand the previous year.
180 The month of October was excessive and there was an unusually rapid movement of the crop. So far as other reasons

for not moving the cotton at the shed here, the reasons given on one or two occasions when requests were made for cars were that the lumbermen were raising Cain about the shortness of cars; that the company was obliged to attempt at least to accommodate all parties, and they always promised to give us cars as rapidly as they could. I do not know of any other reasons.

Q. Was there any such blockade in any previous year, Mr. Smith?

A. Not as great as that.

Redirect examination:

Q. Mr. Smith, had there been no blockade until then? Hadn't there been a blockade previous years?

A. Yes; there has been more or less blockade there every year since I have known it. This movement of the cotton from then is slow.

181 Q. Did I understand you to say in your examination-in-chief that there was a contract to furnish cars to take all the cotton received there?

A. Yes, sir.

Recross-examination:

Q. You mentioned that the defendant paid thirteen cents per hundred for compression of cotton when it was to be shipped by them?

A. Yes.

Q. The Memphis & Little Rock railroad had the same arrangement?

A. Yes.

Q. You were asked if there was any previous blockade. Nothing like this, was it?

A. No; nothing like this.

Q. There has never been any serious shortage?

A. Nothing serious; no, sir.

S. W. TUCKER testified for plaintiff:

Q. You live here, I believe?

A. Yes, sir.

Q. You are connected with the Little Rock and Memphis railroad?

182 A. Yes.

Q. How long have you been connected with that road and succeeding companies?

A. About fifteen years.

Q. Did your railroad (the Little Rock & Memphis road) have any track that ran along in front of this compress shed?

A. No, sir.

Q. Was it your custom, when tickets were brought to your office, issued by the Union Compress Company, to issue bills — lading upon them?

A. Yes, sir.

Q. What was done with the cotton then?

A. Immediately notice was sent to the Union Compress Company that we had issued bills — lading, giving the marks and ordering the cotton out, and then getting the transportation for the cotton.

Q. Was any insurance made generally upon the cotton for the benefit of the railroad?

A. Yes, sir.

183 Q. State whether in September or October or November cotton accumulated there in the cotton-compress shed of the Union Compress Company, and to what extent.

A. Well, sir, we signed a great many receipts for cotton there, and they were finally blocked up. I think on account of not getting the cars for the transfer of the cotton from the compress, from the Little Rock platforms, to the Argenta compress, transportation was not furnished, and the cotton that we had signed for was delayed from four to five weeks, and finally one or two shipments of cotton, 500 or 1,000 bales, the people owning the cotton, rather than have it get in there and get tied up, paid an extra transfer of 2½ ct., & we hauled the cotton from our depot over; that was the condition about that time.

Q. They hauled it from the blockade down to your depot?

A. They made the delivery and we hauled the cotton to the Argenta compress.

184 Q. That was cotton which had been billed by your route?

A. It was cotton that we had contracted for.

Q. Was cotton of your company burned at that fire?

A. Yes.

Q. Did the company have to pay for it?

A. Yes; I think the claim has been settled.

Q. How many bales did your company have there at the compress shed at the time of the fire?

A. About 1,200 bales. We lost about 1,200 bales at that fire.

Q. How long had it been there, the longest, I mean?

A. Some of it had been there five weeks; had not been transferred. The most of the cotton which had been there four or five weeks was all uncompressed. We were waiting for cars. Of course we had no rights. We could not get it out. We had to wait on the Iron Mountain road to make the transfer.

Q. Where was it compressed?

185 A. There was a good deal of compressed cotton that had been compressed right there at the foot of Main street.

Q. Had it been compressed right on the ground?

A. Yes.

Q. Cotton which had been billed by your railroad?

A. Yes, sir.

Q. Do you know whether any complaints were made to the officers of the Iron Mountain road about this blockade of cotton?

A. I cannot say that I know of any except that I know there was a great movement made by the Union Compress Company to get cars to relieve the blockade that occurred at the foot of Main street.

Q. Was it a dry time just before the fire?
A. Yes.
Q. Do you know whether the Iron Mountain road continued to bill cotton up to the time the fire took place?
A. Well, I don't know. I know that the cotton—no,
186 sir; I don't know.

Cross-examination:

Q. Where was the compressed cotton that you speak of, that you had issued bills of lading for? When and where was it compressed?
A. Before they moved the compress.
Q. That was in June?
A. Yes, sir.
Q. Had there been a blockade there all that time, from June up?
A. The cotton had not been moved. Parts of shipments were still in there.
Q. What do you mean by parts of shipments?
A. I mean there was 20 or 30 bales in the shipment; some of it had been compressed and gone and some of it was in back there; it was covered over with uncompressed cotton.
Q. The compress company were shipping their cotton on top of it and leaving this there?
A. Yes.
Q. And if it had been in a different situation there on the
187 platform it would have been then shipped out earlier, would it not?
A. I cannot say. I know that the cotton we had in there was very much delayed.
Q. It was broken lots, was it not?
A. Yes; most of the cotton had gone forward.
Q. How much was there of that, Mr. Tucker? Give me an idea if you can.
A. I cannot say.
Q. Was there over 50 bales?
A. I cannot say.
Q. What time did you issue bills of lading for it?
A. We had some cotton in there about 5 or 6 weeks.
Q. And it was old cotton which had been compressed by the old compress?
A. Yes, sir.

Redirect examination:

Q. How was your office situated with regard to this cotton?
A. How do you mean?
Q. Could you see the cotton?
A. Yes, sir; I could look right down on it.

188 C. F. MARTIN testified for plaintiff:

Q. In 1887 where did you reside and what was your business?
A. In Little Rock; cotton-buyer.
Q. Where was your place of business?
A. Between Elm street and the river on the east side and on the west side of Scott street, east and west of Scott street.
Q. How long had you been there engaged in business?
A. I think about thirteen years.
Q. Were you acquainted with the cotton sheds and warehouses of the Union Compress Company on Main street?
A. I superintended the erection of the Merchants' and Planters' warehouse.
Q. State to the jury which side of the street that was.
A. The Merchants' and Planters' warehouse was 140 x 200, lying between Elm street and what was originally Water street.
Q. (Showing plat.) Who drew this?
A. I did.
Q. You drew it yourself?
189 A. Yes, sir.

(Plat offered—the same plat described and alluded to by Captain W. H. Wright.)

Q. How high was the platform; about the he-ght of a car?
A. Yes; just about on a level with them. The upper floor was about the height of the car; lower, perhaps, about on a line.
Q. Do you know how that cotton was stored there?
A. The uncompressed cotton was kept upstairs on both sides and in Main street. The lower floor of the compress was devoted to the cotton which had been compressed during the stay of the machinery there.
Q. Now, state to the jury whether or not there was any cotton on Main street and to what extent.
A. Main street was pretty well filled to about the center of this (pointing it out on the plat).
Q. Could you estimate the number of bales there was in the street?
A. No, sir; I have no idea. The street was filled with them.
190 Q. How high?
A. They were all on their heads.
Q. Were there any bales that were on top of each other?
A. They were all standing on their heads.
Q. In shape, were they?
A. They were uncompressed.
Q. Covered tight?
A. They were uncompressed.
Q. Well, was there any cotton exposed?
A. The cotton is exposed in every bale.
Q. But those bales there, I mean. Tell the jury how the cotton was exposed.
A. All uncompressed cottons are subject to examination by the

buyer. The manner of sampling is to cut from what is known as the "bulge" of cotton, from which you draw your sample, and then, for the purpose of examination, it is cut diagonally from the head of each bale, and that was about the condition—there was a cut on both heads—and that is about the condition that all cottons are carried to the compress. The compress always fixed those
191 places with the side cloths taken away from the cotton.

Q. Did those bales in the street have the cotton exposed?

A. Yes, sir; necessarily.

Q. Do you know whether there was any stray cotton in the street; I mean loose cotton?

A. I cannot say as to that. It would be impossible to handle cotton in that condition without losing some of it, though as a rule the compress people are very careful to take care of those fallen parts.

Q. Down how near to the track was this cotton piled in this way; to the railroad, I mean?

A. Well, on the lower floor there might have been room enough for a man to pass around the cotton. It was zigzag. It was not piled with any very great care or with any very great regularity. In some places it might have been the width of enough room for a truck to run along and take up the cotton. Generally, when
192 they compressed they utilized all the space they had.

Q. These stairs that you speak of—as you left that corner of Elm street by Hornibrook's, then you turned and went west, and then you struck a platform?

A. And then you struck a platform, & this led to the north, to the level of the siding.

Q. Down to the track?

A. Yes, sir.

Q. How wide was that passage-way, Mr. Martin?

A. Do you mean how wide was the sidewalk?

Q. Yes.

A. Five or six feet.

Q. For what were they used?

A. They were used as a mode of egress and ingress to Main street.

Q. Egress to where?

A. People going to and from the skiff landing to the river.

Q. And for what other purposes?

A. It is a highway.

Q. How about the boat-house?

193 A. Of course people coming to the boat-house had to take the same road as those coming to the skiff landing.

Q. State whether or not there was much travel at that time.

A. About as much as there is at the present day, I imagine, comparing the increase of people.

Q. Any idea how many people went that way every *way*?

A. The skiff man could give you an idea.

Q. Was there cotton on both sides of the stairs of which you speak?

A. Yes, sir.

Q. How near to the passage-way?

A. Jammed up against it.

Q. And did these bales have cotton exposed the same as the others?

A. I think not.

Q. How were they?

A. They were compressed cotton.

Q. You think they were?

A. That is, as a rule.

Q. Now you may state, Mr. Martin, whether this cotton in
194 the streets and warehouses had any protection except as you stated.

A. None, sir, that I know of.

Q. Do you know whether it was sprinkled?

A. I do not.

Q. Did you never see it sprinkled?

A. No, sir; I never saw it sprinkled.

Q. How often did you see that cotton?

A. About every day. I was at my office all the time and along that place.

Q. Were you on the east end?

A. I was on the east end of the block.

Q. Did you know of having that cotton in the streets ever exposed?

A. No, sir.

Q. Where was your cotton?

A. My cotton was on both sides of Scott street—occupied a part of Scott street—and some in Elm street.

Q. That was east, then, from this?

A. Directly adjoining on the east.

Q. In the same block?

A. Yes.

Q. How far was that cotton from the line of the railway—from the track?

A. About 10 or 12 feet, sir.

195 Q. What sort of a season was it?

A. Exceedingly dry.

Q. Do you remember the day of the fire?

A. 14th of November.

Q. How had it been as to being dry for some weeks before that?

A. It was so dry, sir, that the grass would ignite readily along the line.

Q. Know anything about parties sprinkling cotton along the line of the railroad?

A. I had my men sprinkle my cotton after the passing of every train.

Q. How many trains went by there a day?

A. I don't know; different numbers at different times; according to the demands of the business.

Q. You say upon the passage of every train at that time you required your men to spray your cotton?

A. To follow immediately after the cars and put the spray on it.

Q. Where did you obtain the water?

196 A. I employed Col. Zeb Ward to put me in a plug at the corner of Markham and Scott streets, and carried it back to my warehouse on the east side. I then had a long hose, so that I could spray both sides of Scott street.

Q. What railroad company used those tracks?

A. The St. Louis, Iron Mountain and Southern Railway Company.

Q. Now, you say it had been afire once or twice—when?

A. During this dry season.

Q. How long before the fire?

A. I think the last time that I discovered it was about three days before the fire.

Q. Where was that fire?

A. Right north and on the platform north of my warehouse that was burned down.

Q. I mean relatively situated to the tracks of the railway.

A. About 12 feet, on the level of Scott street; the platform was on a level with the street.

Q. Twelve feet south of the track?

197 A. No; it was about 12 feet south of the track and I suppose ten or twelve feet higher than the track.

Q. State whether or not it caught upon that side of it; you had it piled up there in quantities.

A. It caught immediately next to the railroad.

Q. Do you know how?

A. I do not.

Q. You say that you saw this cotton upon Main street stored there by the compress company almost daily. Did you see parties passing to and fro upon this passage-way?

A. I do not know that I ever observed.

Cross-examination.

Q. Where was your place of business?

A. East of Merchants' and Planters' warehouse.

Q. On Scott street?

A. Both sides of Scott street.

Q. You stated yesterday that cotton next to the passage-way was compressed. I wish you would explain what you meant.

A. I stated that the cotton down-stairs under the com-

198 press, on the lower stories, above, in front of the *the* shed below, on the platform leading across the street, underneath and in the excavated part of the compress shed as a rule was compressed—that is, where the compressed cotton was stored previous to shipment. As a rule and without exception cotton on the upper stories of the compress building proper was uncompressed; it was thrown down the slideway for compression.

Q. Was the cotton on either side of the passage-way for footmen in going down the steps compressed cotton?

A. As a rule it was, though how it was upon the day of the fire I don't know. They had been shipping uncompressed cotton.

Q. How long before that fire of the compress had it been moved away?

A. I think seven months, speaking generally of the condition of cotton down-stairs.

Q. Seven months would take it back to May or June?

A. Yes, sir.

199 Q. You saw that cotton in that condition how long before the fire?

A. I don't remember; such a jam at the foot of Main street at the time of the fire I think that the Union Compress Company utilized all the space that they had there for storing both bale cotton and compressed cotton. I am not sure that there was one bale at the time of the fire that was compressed, though my recollection is that there were 700 bales.

A. C. STILLWELL testified for plaintiff:

Q. Are you acquainted with the location of the compress shed at the foot of Main street?

A. Yes, sir.

Q. Were you frequently about there before it burned?

A. Not at the compress. At the time of the fire I was in Pine Bluff.

Q. Previous to the fire?

A. I had been around Mr. Martin's cotton warehouse.

Q. In what capacity were you there?

A. I was there on two or three occasions watching for Mr. Timms, watch——

200 Q. Do you know anything with reference to the fires there?

A. On one occasion Mr. Timms had been back; wind was blowing from the north. I threw a bucket of water on the cotton. Several bales caught fire. We had some little trouble in putting it out.

Q. Any other times that you know of it catching fire?

A. That is the only time that I know of. I don't remember the exact date. It seems to me either November or December, in 1886 or 1887.

Captain WRIGHT recalled:

A. There was a strip of corrugated iron across the north side of the compress shed.

Q. How high?

A. I think up to the second story. My recollection is that it did not come clear down to the floor except at places.

Q. In what place did it come down to the floor? Do you remember?

A. There were openings left for the loading of cars.

201 Q. Can you get me that diagram that you spoke of, if you please?

A. Yes, sir.

(Here the plat introduced in witness's first evidence was produced.)

Q. The line of this platform was inside of your lots?
A. I think so. I will have to see.
Q. Was the cotton piled down within 18 inches of the track?
A. There was always a gangway left.
Q. How wide?
A. Oh, 6 to 8 feet—or 10.
Q. At the time of the fire how full was this lower platform?
A. All full; jammed up to this gangway.
Q. Was the cotton on the end?
A. On end, my recollection is.
Q. Was there more than one door?
A. No, sir; only one door.
Q. Place was all full?
A. Yes, sir.
Q. Did you always keep it that full?
A. We kept that space for compressed cotton when we had
202 the compress in operation at that time.
Q. How did you happen to use it for uncompressed cotton at that time?
A. It was the only place we had.
Q. Would you have had it that full if the cotton had been taken away promptly?
A. No; we would not have had cotton there if we had had transportation—except what might accumulate in a day or two.
Q. How many bales of cotton were probably stored there at the time of the fire?
A. 500 or 1,000 bales. I think that place will hold 1,000 bales or more of compressed cotton. If so, about half that much loose cotton.
Q. All uncompressed cotton?
A. All uncompressed cotton.

Cross-examination:

Q. This is the compress building lying right back of the Dodge & Meade block and the old Metropolitan hotel, is it not?
A. Yes.
Q. This wall here is about how high?
203 A. About 14 or 15 feet.
Q. Covered with roof or not?
A. Yes.
Q. Clear over to the outer shed?
A. Yes.
Q. Was there a roof right over this brick wall clear across, covering the whole of the compress building?
A. Yes.
Q. What wall was that?
A. A brick wall.
Q. Extended to the e-ves of the roof?
A. Yes.

Q. So that the whole of that was covered with a roof and the brick wall on each side?
A. Yes.
Q. On the side next to the railroad how was the front of this, on a line with the street?
A. Yes.
Q. Corrugated iron in front?
A. No.
Q. Was there nothing around the boiler-rooms to protect them?
A. Yes; they were enclosed with brick.
204 Q. From here to here?
A. There was no special protection there—an open shaft.
Q. From this point to this point was there no corrugated iron wall thrown up that way with openings to load the cars on?
A. Yes, sir; it was.
Q. That was on the lower floor?
A. Yes.
Q. And then this iron wall extended in this way up to the second floor?
A. Yes.
Q. How far did the second floor extend over here back this way from Main street?
A. It came near the corner of the street. I could not tell exactly.
Q. How far did it come back this way? Did it cover the entire compress building?
A. That is my recollection.
Q. Where was the open shaft where the machine used to be? Locate it on the plan.
—. ——.
Q. How large an opening was that, Captain Wright?
205 A. It covered a space of two boilers, 25 x 15 feet. We had a railing so that the cotton could not be thrown into it.

Judge Rose:

Q. How many doors did you say there were along here?
A. A door for every car.
Q. How many cars, about?
A. I suppose 6 or 8; that would be 150 feet, probably.
Q. How wide were those doors?
A. Six or eight feet.
Q. Open or shut?
A. Open. I think they slided up.
Q. How high were they?
A. The height of one length of corrugated iron was about 8 feet.
Q. Were they up or down at the time of the fire?
A. I could not tell you. I suppose they were up.
Q. Don't you know anything about that?
A. No, sir; I could not say positively that that iron extended up to the corner of the street.
Q. What was the height of the upper from the lower floor?
206 A. 12 or 14 feet, or maybe 15.

Q. Could you tell how far the corrugated iron extended down by the diagram?

A. No; but there are persons here who ought to know.

Q. Is Mr. Apperson here?

A. Yes, sir.

Judge CALDWELL:

Q. In your former examination I understood you to say that the compress company received cotton at the shed at the foot of Main street for transportation to Argenta for compression.

A. Yes, sir.

Q. Under the contract between the railroad company and the compress company was the railroad company bound to haul all the cotton deposited at the shed at the foot of Main street as fast as deposited or as fast as ordered by the company to the compress at Argenta?

A. Yes; that is my understanding of the contract.

Q. Did you make the contract?

207 A. Mr. Uhrquhart, who was president of the company at the time it was made.

Q. Did the railway company haul any cotton from Main street to Argenta that was not billed for transportation east before it was taken from the sheds?

A. Billed it directly from the sheds.

Q. Where were the through bills of lading made out?

A. At the company's office; all the cotton that was put there was put there for the purpose of compression; we never received the cotton for any other purpose.

Q. How did the railroad company get possession of cotton to transport to Argenta?

A. We loaded it on its cars.

Q. Did you load it on the cars without having a bill of lading?

A. No, sir.

Q. Did the terms of those bills of lading—what were the

208 terms of those bills of lading? Was it a bill of lading to Argenta or——

A. Bill of lading through to destination.

Q. No bills of lading from the foot of Main street to Argenta?

A. No, sir.

Q. Railroad received cotton covered by through bills of lading?

A. Yes.

Q. To you or to the shipper?

A. To the shipper.

Q. They reserved the right to compress and taking the cotton to Argenta for that purpose?

A. Yes, sir.

Judge ROSE:

Q. Is that the form used by the railroad company?

A. That is my recollection of it.

Q. You have seen them, however, haven't you?
A. Yes, sir.
Q. I think that is the blank?
A. Yes; that is my recollection of the blank.

Judge CALDWELL:

Q. You received the cotton at the foot of Main street for compression?
A. For compression.
209 Q. Was it understood that all compressed cotton was for shipment by rail?
A. Yes.
Q. Did you receive any that was not for shipment by rail?
A. No, sir.
Q. Was all compressed cotton to be shipped by the defendant's road?
A. By the railroads issuing the bills of lading. Understand, now, there were other roads issuing bills of lading.
Q. One other road?
A. Yes, sir; the railroad company after issuing the bills of lading would order us to ship that cotton to——
Q. When you received the cotton at the foot of Main street it was not compressed?
A. No, sir.
Q. It was understood that the carrier would take it to Argenta for the purpose of compression?
A. Yes.
Q. They had that right?
A. Yes.
210 Q. The Iron Mountain road took all the cotton?
A. Yes; the other road had no track into the compress.
Q. It was understood between the compress company and the defendant railroad company that it would take all cotton deposited at the foot of Main street for compression?
A. Yes, sir.
Q. It took the cotton that was deposited there for compression, as well as that that was intended to be shipped by its line, as that to be shipped by the Memphis and Little Rock railroad?
A. Yes.
Q. How did it get possession of the cotton that was to be shipped by the Memphis and Little Rock?
A. We loaded it on the bills of lading.
Q. What evidence did you get that this was for the defendant railroad company? You did not get this bill of lading?
211 A. We got the Memphis and Little Rock bill of lading.
Q. But it was understood that the defendant would transport that cotton going over the Memphis and Little Rock; they would transport it to Argenta for compression. When you loaded a car what evidence did you have that it was for them?
A. The order of the traffic manager of the Memphis and Little Rock railroad.

Q. You had his order to the shippers?
A. To the shippers; yes.
Q. When you loaded a car with cotton that was to be shipped to Argenta and compressed and shipped from there by the Memphis and Little Rock, what evidence did you get from the Iron Mountain road that you had loaded that car?

(MOORE:)

A. His own records showed it.
Q. Was there no bill — lading given for the shipment of cotton from here to Argenta?
A. No.
212 Q. I have 100 bales of cotton for Smith & Co. that I want taken to Argenta to be compressed and he would send you two (2) cars and you would load the cotton on it, what would you have to show?
A. Our way-bills.
Q. But no bill of lading?
A. No, sir; we had no bill of lading.
Q. You paid two dollars per car for the transportation of the cotton across?
A. Yes, sir.
Q. At whose expense was the cotton compressed?
A. Expense of the railroad company.
Q. They paid the expense of compression?
A. Yes.
Q. For cotton on the Memphis and Little Rock they would pay that?
A. The Memphis & Little Rock.
Q. The Iron Mountain on its road?
A. Yes; settlements were made weekly.
Q. You did not make the contract yourself under which you were operating? Explain to the jury what was done with
213 the cotton that was brought to the compress company.
A. We issued a receipt for it to the owner.
Q. What did he do with that receipt?
A. He took the receipt to the railroad company.
Q. What did the railroad company do with it?
A. Thereupon the railroad company issued a bill of lading to the owner of the cotton and an order to us.
Q. What was that order? Is that one of the orders?
A. Yes, sir.
Q. Anything about insurance?
A. That was set out in the receipt. The contract was and the agreement was that the railroad company would insure all cotton as soon as we were notified that the bill of lading had been issued.
Q. What then?
A. We loaded it on the cars.
Q. Did you keep a sufficient number of hands?
A. At all times.

214 Q. You had a way-bill for the cotton to be shipped by the Memphis and Little Rock road?

A. Yes, sir; for both roads.

Q. The Memphis road had no track connected with this compress in the city of Little Rock?

A. No, sir.

Q. Did it have a track connected with the compress at Argenta?

A. Yes.

Q. So that when the cotton was compressed it could be put on the Memphis cars?

A. The siding on the south side of the compress is the Memphis siding.

Q. Had separate sidings in Argenta?

A. Yes.

(MOORE:)

Q. You stated that you got 13 cents per 100?

A. Yes, sir.

Q. That was for cotton originating here, covering insurance, handling, and compression?

A. Yes.

Cross-examination:

Q. You stated, I believe, that Mr. Howell made that contract in St. Louis with Mr. Newman?

215 A. A renewal of the old contract. Mr. Howell was authorized by the board of directors to do so.

Q. He went there in September for that purpose?

A. Yes, sir.

Q. Cotton would be brought to you by the owner, the cotton-buyer?

A. Yes.

Q. When it was brought to you you would issue one of those dray tickets?

A. Yes, sir.

Q. The owner, when he got ready to have the cotton billed, would take it to the railroad company and get a bill of lading?

A. Yes; those receipts.

Q. Your warehouse receipts to the railroad company and get a bill of lading?

A. Yes, sir.

Q. Suppose the owner of the cotton did not have lots made up and classified in a way to suit him, he would not go to get a bill of lading until he had got it classified to suit him?

216 A. That was a matter altogether with the buyer, of course.

Q. Didn't you have some trouble with cotton-buyers on that point?

A. Yes, sir.

Q. Some complaint made about cotton being held longer than

you wanted it held on the ground; that you did not want to store cotton in that way until it was ready to be shipped?

A. Yes; we gave this notice that we would receive no cotton until it was ready for shipment. We did not have the space to take cotton unless it was ready to go forward.

Q. When the bill of lading was issued the railroad company would send you the notice, which was in the hands of the court a moment ago, that b. l. had been issued?

A. Yes.

Q. Do you know what the course of business was in regard to that?

A. Yes; I do know, but that was a matter with the secretary of the compress company.

217 Q. Didn't the railroad company put these cars off on the side track there; didn't they load it into the cars, keep a record, take it over there and unload it out of the cars, compress it, and then load it back for shipment to destination?

A. Yes; according to these memorandum way-bills.

Q. Did the railroad company issue the compress company way-bills for cotton loaded by them onto these cars?

A. I know that as a matter of fact—that is, of form—those way-bills were not issued to me.

Q. Wasn't the cotton loaded by your men on the cars?

A. Yes, sir.

Q. Unloaded off the cars by your men?

A. Yes.

Q. The railroad simply hitched its engine to the cars and took them to Argenta?

A. Yes.

218 Q. Didn't your men keep a record and not the railroad?

A. We both kept a record.

Redirect examination:

Q. What is the width of this railroad track?

A. Standard gauge, I think, 4′ 8½″.

A. I suppose the width of all the tracks would be 40 feet. There were three or four tracks, I think. I don't know that all of them covered all of the compress front.

Q. Was there any cut there or was it level ground?

A. Level ground. There was a little trestle there.

Q. Street was level?

A. Oh, yes.

Q. Do you know the distance from the south side of the boat-house to the north end of your platform?

A. I would say——

HENRY LEE recalled for plaintiff:

219 Q. Do you know anything about people smoking about that compress? What do you know about it? If you know anything tell the jury.

A. People passing, coming along down the stairway, would be smoking occasionally. As a general thing, in coming into the compress there is no smoking allowed in there, sir.

Q. In passing up and down?

A. Well, the stairway, yes; people would be smoking crossing the river or something.

Q. Was there much passing over the river at that time by skiff?

A. Not after that bridge got put there. There is not much since then.

Q. How many skiffs at that time?

A. Four or five.

Q. Were they kept busy or not?

A. I could not tell you exactly. I was at work and did not keep notice.

Q. Did you tell anybody there not to smoke—forbid their smoking?

A. Yes; men walking out where the cotton was on the platform I would tell them that it was not allowed around the cotton,
220 and a good many of them would say, All right, sir, and they would go back or else put the cigar out.

Q. What did some others say?

A. About all, I think, they would go back or put the cigar out.

SAM. PRYOR testifies for plaintiff:

Q. What business were you engaged in in the fall of 1887?

A. Working at the compress down on the river.

Q. Do you remember and can you state to the jury whether you saw people smoking coming to and from the skiff landing and the boat-house?

A. Yes, sir.

Q. Was that frequently?

A. Frequently.

Q. Did you forbid their smoking?

A. No, sir; not on the public gangway.

Q. No; you didn't?

A. No, sir; I did anywhere else about the cotton except there.

Q. Why did you not forbid them there?

221 A. I had no orders.

Q. You were watchman of the cotton compress, were you?

A. Yes, sir.

Q. You saw them frequently?

A. Yes, sir.

Q. What were they smoking?

A. Well, sometimes smoking cigarettes and sometimes cigars and sometimes pipes.

THOMAS BARBER testified for plaintiff:

Q. What business were you engaged in in the fall of 1887?

A. I was running a skiff-ferry back and forth from Little Rock to Argenta.

Q. Previous to the fire that occurred in the shed were you about the premises about the Athletic landing and skiff landing?

A. Yes, sir; I was pretty close around there.

Q. How many skiffs were running across the river, regularly, I mean?

222 A. There were four skiffs running at that time.

Q. Was there much passing to and fro?

A. Yes, sir; right smart.

Q. How did they go down to the skiff landing?

A. From the front of Main street they had two gangways, one on each side of the street.

Q. Did you see people smoking when they would come from there?

A. Yes, sir; around there all the time.

Q. Any remonstrance made that you made?

A. The company had signs all around there, no smoking allowed.

Q. Did you hear any one remonstrate with the people that were smoking?

A. I did not hear so much. I have heard some of them say they did not allow smoking around there. Some would smoke and some would not.

Q. What did they say?

A. Some would say nothing; would just smoke, if they wanted to.

Q. Do you know anything about ladies passing down on that gangway?

223 A. Ladies went along there as much as anybody else.

Q. How wide was that passage for them to go down and up?

A. There was just room enough, I think, for two to walk close together.

Q. Was there anything on both sides of it or not?

A. On both sides of the gangway?

Q. Yes.

A. On that side of the street of course there was a little cotton between that brick wall and that door. There was a little cotton between there and Mr. Hornibrook's, and then there was a little cotton on each side of it. When you got below that door no cotton only on one side of the street. After you passed that door of course the cotton was up away from that side; was in the middle of the street.

Cross-examination:

Q. You say the company had signs up about smoking?

224 A. Yes, sir.

Redirect examination:

Q. Where were those signs?

A. Nailed up there on the posts around.

Q. Outside or inside?
A. Some of them were outside and some of them were back in the compress.

M. T. HUFF testified for plaintiff:

Q. What business were you engaged in in the fall of 1887?
A. I was running a skiff ferry.
Q. Did you see people smoking through the cotton at the foot of Main street?
A. Yes, sir.
Q. How often?
A. Every day.
Q. Any objections or remonstrance made to it?
A. Sometimes.
Q. Would they quit?
A. No, sir; some of them would not quit.
Q. What would they say?
A. That they had the right to smoke on the sidewalk.

225 G. P. C. RUMBOUGH testified for plaintiff:

Q. What is your business?
A. Civil engineer.
Q. Look at this map and see if you made it.
A. Yes, sir.
Q. What does it represent?
A. It represents the river front between Main street and Spring street.
Q. That was drawn to a scale?
A. Yes, sir.
Q. What was the scale?
A. 50 feet to the inch.
Q. Was this correctly drawn?
A. Yes. I made it.
Q. What is the width of the streets of this city?
A. Generally 60 feet, except Broadway, which is 80 feet; Rector avenue from 70 to 90 feet, and in Woodruff's addition 60 feet.

Cross-examination:

Q. Has Water street ever been opened for travel between the county jail and Scott street?
A. It was opened at one time—I forget now, but Mr. Jones,
226 city clerk, can tell you—until Mr. Jake Frolick captured it for the State.
Q. You were speaking of the north of the state-house?
A. Yes, sir; it was opened to Ashley, from Spring to Ashley.
Q. Where is Ashley street, immediately east of the state-house?
A. Yes.
Q. Was it passable along there for vehicles?
A. I don't think it has ever been.

Q. Not in condition to be used, was it?
A. I don't think it was at the west end.
Q. Between Ashley and Scott was it ever opened for travel?
A. No, sir; you mean for vehicles?
Q. Yes.
A. No, sir.

S. W. TUCKER recalled for plaintiff:

Q. You stated that a good many bales of cotton that were
227 waiting for the Memphis and Little Rock railway at the compress sheds had been by the railway company or the owners of the cotton hauled away from there to some place within the reach of the Memphis railway?
A. No, sir; the cotton was not delivered at that compress, but the cotton was taken direct from the factors here and delivered to us at Little Rock. We hauled it over in our cars and had it compressed there.
Q. Where was it put on the cars?
A. It was put on the cars at the Little Rock depot.
Q. At the upper end of town?
A. Yes, sir.
Q. Hauled the cotton all the way to the depot rather than take it down and have it wait?
A. Yes, sir; on account of the block at the Main-street shed they could not take the cotton there, and in order to relieve the
228 situation and not delay this shipment, why we hauled it from our depot over to Argenta in our cars at an additional expense to us.
Q. Have you made an examination to ascertain the number of bales?
A. I have not examined any records. I think about 700 bales.

(Judge CALDWELL:)

Q. What 700 bales?
A. Could not be delivered at the compress on account of the blockade; it was hauled over by the Memphis and Little Rock railroad.

Cross-examination:

Q. To whom did that cotton belong?
A. To one or two of the cottonmen here.
Q. Do you remember their names?
A. Mr. Sam. O. Smith was one.
Q. Who else?
A. I am not positive, but I think Mr. Howell. I don't remember now; eight or nine men shipping with us, dividing the business up.

G. H. VAN ETTEN, for plaintiff:

Q. Where do you live?
A. In Little Rock.

229 Q. How long have you been living here?
A. Between 12 and 15 years.
Q. What business have you been engaged in?
A. The lumber business.
Q. Did you have occasion within two or three years before the fire, the 14th of November, 1887, to ship lumber here?
A. Yes; I have been shipping ever since I have been here.
Q. Over the Iron Mountain railroad?
A. The Iron Mountain principally.
Q. State when the first trouble began with the railroad company with regard to the transporting of lumber, as well as you remember.
A. I cannot tell the year; it commenced about the time Gould got possession of the Iron Mountain road.
Q. About how many years ago?
A. Six or seven.
Q. Just state to the jury the delay there was and what was done about it; state the whole matter.
230 A. There was hardly ever any delay except in the fall.
Q. What was the extent of that delay?
A. There was more stuff than they could supply cars for; cotton coming in naturally makes cars scarce.
Q. Did it occur more than one year?
A. Oh, yes; they were scarce every year.
Q. Any remonstrance made about this state of things to the company?
A. Yes; there had been remonstrance made every year by the lumbermen; the cottonmen joined with the lumbermen once.
Q. What year was that?
A. I think it was in 1887.
Q. Do you know what answer they got?
A. Got a promise of cars most always. Always got promises.
Q. Do you remember Mr. Gould being down here about
231 that matter one time and the interview with him about that?
A. Yes, sir.
Q. He was acting as president at that time?
A. Yes.
Q. What time was that?
A. I think it was in 1886—1885 or '6.
Q. What did he say would be done to remedy the matter?
A. He said he was not aware of such shortage and it should be obviated.
Q. There had always been a shortage, had there?
A. Yes, sir.
Q. How great was that shortage in 1887; how much was lumber delayed?
A. It was impossible to tell; according to the way you would get cars; get one car when you would want five.
Q. That has been the same ever since 1887?
A. Before and since, for those two months, October and No-
232 vember. We got no help until in December.

Q. Did you ever perceive that there was any particular relief afforded by the interview with Mr. Gould?

(Objection made by defendant. Overruled.)

A. They put on more cars, but not enough to help us out any. Their roads increased faster than their rolling stock—their mileage in roads. I think they put more cars on every year, but they built more road every year.

Q. Did the increase have any effect upon relieving the market at this place?

A. None perceptible. I don't think it had.

Cross-examination:

Q. What reason do you say was given by the railroad for their failure to furnish transportation in October and November?

A. It was very hard to get a reason out of them.

233 Q. You said that their excuse was that the cars were engaged in hauling cotton.

A. No; I said that probably the cars were being used for that purpose.

Q. Wasn't it true that the scarcity of cars in October and November was on account of the movement of cotton?

A. I suppose it was a great deal; one fall it was on account of moving ties a great deal, building new railroad.

Q. When is the bulk of the cotton crop moved?

A. I suppose in October and November.

Q. Fall and winter?

A. Yes, sir.

When the testimony of G. H. Van Etten was given and at the time the defendant, by its counsel, excepted to all that part of the testimony relating to the block on the defendant's railroad during the years '86 and '87 wherein there was a delay in the shipment

234 of lumber, for the reason that said evidence was incompetent, irrelevant, and immaterial; but the court overruled said objection and permitted the same to go to the jury; whereupon defendant saved its exceptions then and there, by its counsel.

C. E. FERGUSON testified for plaintiff:

Q. What is your business?

A. I am in the lumber business.

Q. How long have you been engaged in that business here?

A. Seven years.

Q. Were you in the lumber business in the fall of 1887 and for several years previously?

A. Yes, sir.

Q. Were you acquainted with the shipping facilities furnished by the Iron Mountain road in the fall of 1887 and a year or two previous to that time?

A. Well, as far as that concerned my business, I was; yes.

Q. What were the facilities afforded by the Iron Mountain road for shipping purposes; sufficient or insufficient?

235 A. Insufficient along at the fall of the year.

(Objected to by defendant.)

To the above testimony the defendant, by its counsel, at the proper time and in the proper manner objected because the same was incompetent, irrelevant, and immaterial, but the court overruled said objection and the defendant then and there saved its exceptions.

L. W. Coy testified for plaintiff:

Q. What business were you engaged in in 1887?

A. In the First National bank; also in the lumber business.

Q. How long had you been engaged in the lumber business at that time?

A. About four years, I think.

Q. Did you have occasion to know the facilities provided by the Iron Mountain road for the shipment of lumber and cotton and other commodities?

236 A. As far as lumber was concerned, yes, sir.

Q. What were the facilities—sufficient or insufficient?

(Objected to by defendant. Exception reserved.)

Q. When was the scarcity?

A. Always; every year.

Q. What months?

A. In the fall trade—September to December.

Q. On what road; Mr. Coy?

A. More or less on all the roads.

Q. How was it on the Iron Mountain road?

A. There was always a scarcity in the fall—so much so that it was a matter of public notoriety.

Q. Did you hear any complaint by the cottonmen?

A. It was understood.

(Objected to by defendant.)

Q. Did you, with any others, approach any officials of the road about the shortage in cars?

A. We had an organization at that time which I think attended to that business. As near as I remember, suppose I acted with the rest.

237 Q. Did you talk with any of the officials or hear anybody else talk in your presence?

A. I did myself, no doubt, more or less; I don't know how much. I know it was a common thing to see them and try and get more cars.

(The defendant at the proper time and in the proper manner objected to all of the above testimony of L. W. Coy as incompetent,

irrelevant, and immaterial; but, the same being overruled by the court, defendant then and there saved its exceptions.)

J. H. TRUMP testified for plaintiff:

Q. What is your business now?
A. Wholesale lumber.
Q. What were you engaged in in 1887?
A. Secretary for the J. H. Bratt Lumber Co.
Q. Where was it located?
A. At Malvern, this State.
Q. Were you connected with any other organization that had under its supervision any shipping business?
238 A. Yes; I was secretary for the Arkansas Lumbermen's Association.
Q. Do you remember and can you relate to the jury the facilities afforded by the Iron Mountain road for the commodities in this State along those years?

MOORE:

Q. What kind of commodities? Do you know anything about cotton?
A. No, sir; except in a general way. The supply of cars in 1886 for the months of September to January was almost nothing; possibly the whole averaged less than one-fourth of the necessities. In 1887 our average was, until about the 20th of November, a little less than one-fourth. From the first of September to the first week in December they could furnish only one-fourth of the necessary cars to move lumber.
Q. Were there complaints made about it?
A. Yes, sir.
Q. To whom?
A. Complaints were made by the association in 1886. They were made to Mr. Kerrigan and Mr. Clark.
239 Q. Who were they?
A. Officials of the Missouri Pacific. Mr. Kerrigan was general superintendant and Mr. Clark manager, and the same in 1887—that is, the complaints were made by individuals, but speaking as the association.

MOORE:

Q. Were you present when those individuals made those complaints?
A. No, sir.

MOORE:

Q. How do you know, then?
A. From the reports.
Q. Did you, as an individual, make any complaints?
A. We made complaints.

Q. What year did you make complaint?
A. In 1886 and 1887.
Q. What was the excess of lumber in 1887 over 1886, if any?
A. A small increase of 1887 over 1886. It was pretty heavy earlier in the season and in the early part of the year.
Q. Did you have any personal conversation and make any personal statement or were you present when others made them
240 to the officials of that road concerning the increase in business and the necessity for an increase of shipping facilities?
A. Yes, sir; I was present when the officers and executive committee of our association met Mr. Gould, Mr. Clark, Mr. Kerrigan, and Mr. Newman.
Q. Where did you meet them?
A. At Mr. Gould's car, at the Union depot here.
Q. Was it at the Union depot or at the river front?
A. On the river front.
Q. When was that?
A. About January 15, 1887.
Q. What information was given to the officials of that road with reference to the increased traffic on the road, and was it talked of?
A. It was talked over. I do not remember the exact figures of the estimated increase, but it was a very large increase over the previous years.
241 Q. To whom was that given and by whom? Who solicited the information?
A. Mr. Gould, to my recollection, more directly asked for the information.
Q. Of whom?
A. Of members of the association—gentlemen present.
Q. Was the information given to him in detail?
—. ——.
Q. In a verbal manner?
A. Yes, sir; as far as I recollect.
Q. Was an inquiry made by Mr. Gould?
(Objected to by defendant.)
Q. Was any information given to Mr. Gould by any of its officials with reference to that subject?
A. Yes, sir; Mr. Newman gave him an outline of the increase in the lumber business for the year 1886 and his estimate of what it was likely to be for the year 1887 and subsequent years.
Q. Do you remember whether or not Mr. Newman's estimate ran back of 1886?
242 A. My impression is that he spoke also of 1885 in comparison with the increase, but I am not positive.
Q. Do you know what the increase of local business was for several years previous to 1887, one year after another—what percentage of increase?
A. No, sir; I could not give you the percentage. The increase for 1884, '5, '6, was very large. Previous to 1886 the shipments of

yellow-pine lumber were very small. Business pushed forward during 1884, 1885, and '6.

Q. Was that an immediate increase or gradual increase?

A. It was gradual through those years; probably a larger increase, I suppose, in 1885–'6 than in the others.

Q. Who was Mr. Newman?

A. Traffic manager of the Missouri Pacific Railroad Company.

Q. Any other official position?

A. One of the vice-presidents. I do not know which number.

Q. You say the increase in 1887 was slight. Do you know about what that increase was?

243 A. No, sir; I could not give you anything like accurate figures.

Q. Do you know what percentage it was as compared with 1885 or 1886, greater or less?

A. It was smaller increase in percentage over 1886 than 1886 was over 1885.

Q. Demands were made of the railway officials for a supply of cars. What response did they meet with?

A. Promises of giving us more all the while.

Q. Did they do it?

A. No, sir; they would give us more for a week. When Mr. Clark made positive promises they would give us more for a week or ten days, and then fall back again.

(Objected to by defendant.)

Cross-examination:

Q. What lumber company do you represent?

A. I am secretary of the J. A. Bratt Lumber Company.

Q. Where do they do business?

244 A. At Malvern. This correspondence was as secretary of the Arkansas Lumbermen's Association.

Q. How much business did the Bratt Lumber Company do in the year 1886?

A. My recollection is they shipped a fraction under 1,000 cars.

Q. How much did they do in 1887?

A. I think a fraction under 1,100 cars.

Q. Where did they ship the most of it to?

A. Largely to Omaha.

Q. By what route did it come out?

A. It came out north on the Iron Mountain—on the Missouri Pacific system.

Q. What seasons were those shipments made in?

A. Our trade would be about equal every month in the year if we had transportation.

Q. When were you shortest in transportation?

A. In 1886, from September until the first of January.

Q. How was it in 1887?

245 A. Very bad the same time—in September until the early part of December.

(To the testimony of J. H. Trump, as above given, the defendant at the proper time and in the proper manner objected to said evidence going to the jury as incompetent, irrelevant, and immaterial, but the court overruled said objection, and the defendant then and there saved its exceptions.)

C. F. PENZEL testified for plaintiff:

Q. What business were you engaged in in 1885, 1886, and 1887?
A. Principally in the grocery business.
Q. How long had you been engaged in it previous to those years?
A. About twenty years to that.
Q. Did you have any interest in connection with lumber in the State?
A. I was interested in the lumber business in Kansas.

246 Q. Do you know what the shipping facilities offered by the Iron Mountain road were at that time—whether the facilities were sufficient or insufficient for the purposes of freight at this point?

A. Do you mean the grocery or the lumber business?
Q. I mean the lumber and the cotton business.
A. What period of time?
Q. I mean in 1886 and 1887, particularly in 1887.
A. There was a great shortage of cars in 1886 and 1887, as far as my knowledge goes; as long as I was connected with the Arkansas Lumbermen's Association, from the fall of 1886 to January, 1888. As long as I was connected with the Arkansas Lumbermen's Association there was a shortage of cars, as far as I have any knowledge.
Q. Do you know whether remonstrances were made to the officials of the road? If so, state what you know with reference to that.

247 A. There were communications in the fall of 1886 and a personal interview along in the fall of 1887 and some correspondence between myself as president and Mr. Clark in the fall of 1887.

Q. Who was Mr. Clark?
A. Vice-president or manager of the Missouri Pacific system; offices in St. Louis.

Cross-examination:

Q. Your interests, you say, were in Kansas?
A. Yes, sir.
Q. And the shipment of lumber?
A. From this State.
Q. Where did you make your purchases—at the mills?
A. Yes; at the mills, principally on the Iron Mountain road south.

(To the testimony of Chas. F. Penzel, defendant at the proper time and in the proper manner objected to the same, but the court

overruled the said objection, and the defendant then and there, by its counsel, saved its exceptions.)

Plaintiff then introduced R. E. Douglass, a witness in their behalf, who stated that the policy of insurance issued to R. E.
248 Douglass & Co. by the plaintiff was negotiated for and issued in the city of New York; that the contract of insurance was made there by a member of the firm named W. H. Ragland and the premium paid in the city of New York; that R. E. Douglass was a stockholder in the Union Compress Company at the time of the fire and he and W. H. Ragland were and are citizens of the State of Arkansas; also A. P. Howell, who testified that the policy of insurance issued by plaintiff referred to in this suit was contracted for, paid for, and issued to the Howell Cotton Company by the plaintiff in the city of New York; that he composed the Howell Cotton Company and was at the institution of this suit and is now a citizen of the State of Arkansas.

JOHN FRANKLIN testified:

Q. How far was it from the edge of the railroad track?

A. About six or eight or ten feet.

249 Q. How far was it from the railroad to the platform?

A. Just room enough to lay the iron to run the tracks on.

Q. How long had you been sitting down there?

A. I was not sitting; I was standing.

Q. How long had you been standing?

A. Not long; I was waiting for this lady. It was our business to carry their bundles down, as they generally wanted to hold up their clothes while they were passing through this cotton.

Q. Did they complain about it?

A. Sometimes they did and sometimes they didn't.

Q. Cotton piled so close that they would get on their dresses?

A. Yes; more or less.

Q. How long had they been piling cotton there?

A. The whole season.

Q. Was the street more or less filled all the time?

A. There was lots of cotton. These men were idle, waiting for cars to ship it.

250 Q. Did you know anything about people smoking up there?

A. Yes, sir; I have seen them and have heard the watchman speak to them about it, and, I think, have heard their answers.

Q. What did they say?

A. They said it was in the middle of the street and they would smoke as much as they damn please. Different remarks at different times, and, I think, I heard different watchmen speak to them.

251 Plaintiff then introduced in evidence an ordinance of the city of Little Rock in force on and prior to November 14th, 1887, which reads as follows:

"SEC. 596. No person shall incumber or obstruct any street, alley, or other public place by placing therein or thereon any building

materials or any article or thing whatsoever without having first obtained written permission from the street commissioner, under a penalty of two dollars for each offense, and a further penalty of five dollars for each day or part of a day such incumbrance or obstruction shall continue."

Digest, 1871, sec. 442.

To the introduction of said ordinance the defendant at the proper time and in the proper manner objected upon the ground that the same was irrelevant, incompetent, and immaterial to the issue involved; which objection was overruled by the court; to which ruling the defendant, by its counsel, then and there duly excepted.

The plaintiff then introduced in evidence a proclamation
252 by the mayor of the city of Little Rock, which is in words as follows:

"*Mayor's Proclamation.*"

Proclamation by the mayor of Little Rock concerning the storage of cotton on the city streets and alleys.

Whereas depositing of cotton bales on the streets and alleys of the city is often a serious obstacle to travel and the proper use of the public highways, defacing the appearance of the streets, endangering adjacent property as well as the cotton itself from fire; and

Whereas the said practice seems to have become unnecessary through facilities now prepared and preparing on private property; and

Whereas the said practice is as much in violation of the city ordinance as would be the storage on the streets of an equal quantity of hay bales and dry-goods boxes:

Now, therefore, from and after this date the storage of cotton on said streets and alleys or depositing the same thereon, save for the purpose of unloading and reloading, is forbidden, and all
253 persons guilty of the said acts will be proceeded against according to the ordinances governing the same.

In witness whereof I hereunto affix my name this 7th day of September, 1887.

WILLIAM G. WHIPPLE,
Mayor of Little Rock.

Attest: H. C. JONES, *City Clerk.*

To the introduction of said proclamation in evidence the defendant at the proper time and in the proper manner objected because the same was incompetent, irrelevant, and immaterial; but the court overruled said objection; to which ruling the defendant, by its counsel, then and there duly excepted.

This was all the evidence on behalf of the plaintiff.

To sustain its defense defendant introduced the following testimony, viz:

A. P. HOWELL, for defendant:

Q. I believe you stated last week that you went to St. Louis
254 in September and made the arrangement with the Iron Mountain road for hauling cotton from the cotton shed at the foot of Main to the compress across the river.

A. Yes.

Q. What time in September?

A. I don't remember the exact date; early part of September.

Q. What was the occasion of your going?

A. I went to represent the compress company.

Q. Was there any particular agents' meeting?

A. Yes; there was a general meeting of the freight agents of the Arkansas district. They met to make their arrangements for the coming season of business.

Q. What arrangements?

A. Freight rates.

Q. It was a general meeting of the freight agents representing the freight business of this State for the purpose of arranging rates for the business for that season?

A. Yes.

Q. Were there any other interest- represented there besides
255 the interests represented by these freight agents and the compress interests represented by you?

A. I suppose the freight agents took the entire business in the State.

Q. Were there any other compress agents present?

A. Yes; from Pine Bluff, Ft. Smith, and Texarkana, I think.

Q. For the purpose of arranging with regard to rates?

A. Yes.

Q. Please state what the freight business was that was transacted by that meeting of freight agents.

A. I think the freight agents met and discussed matters, and decided to hear the compress men on what they wanted first.

Q. I want you to state now who your conversation was with.

A. With Mr. Newman, 3rd vice-president I. M. R'y.

Q. What did you tell him that you wanted?

A. 13 cents per 100 for compressing, and we wanted them to haul cotton from Little Rock to Argenta at $2.00 per car.

256 Q. What did Mr. Newman say to you in answer to your proposition?

A. I don't know that he answered right then, but before we left he agreed to those figures.

Q. Try and refresh your memory; what time did he answer?

A. Before that meeting broke up.

Q. What was his answer? State it as near as you can.

A. It was that he agreed to those rates.

Q. Anything else?

A. Only about insurance.

Q. What was the agreement in regard to insurance?

A. We agreed to insure the cotton for the benefit of the R'y Co's after bills of lading had been issued on the cotton.

Q. Is that all that occurred in regard to the matter?
A. Yes, sir.
Q. The agreement in regard to insuring the cotton, and the statement of rates for hauling cotton from Little Rock to Argenta, and also rates for compressing it, and his statement that he would give you a $2.00 rate per car for hauling and 13 cents for compression?
257 A. Yes; that is all.
Q. Anything said in regard to the means and the time of transferring the cotton?
A. No, sir.
Q. You have stated about all that was said, have you?
A. Yes, sir.
Q. The arrangement was made between you and Mr. Newman?
A. Yes, sir.
Q. The Union Compress Co. had been organized that summer a few months before that?
A. Yes; in June.
Q. Never done business prior to that time?
A. No, sir.
Q. Never had any contract with anybody prior to the time it was organized, of course?
A. No, sir.
Q. Any reference made or anything at all said about the old Little Rock Oil and Comp. Co., the contract that had existed between them and the R. R. Co.?
A. I don't remember that there was.
258 Q. In your arrangement with Mr. Newman was any reference made to the arrangement previouely existing between Mr. Newman and the old Little Rock Compress Co.?
A. No, sir.
Q. Had you been an officer of the old company?
A. No, sir.
Q. Had any connection with it?
A. None whatever, only as a dealer.
Q. No member or stockholder?
A. No, sir.

Cross-examination:

Q. At the time you went to St. Louis you knew what the course of business between the Little Rock Compress Company and the Iron Mountain road had been with reference to the transportation of cotton for compression from the foot of Main street?
A. Yes, sir; I knew something about it.
Q. How long were you in St. Louis attending that meeting?
A. I think about two days.
Q. You don't remember, I suppose, the words that were spoken at that meeting?
259 A. No, sir; I don't remember exactly.
Q. You went there and your application was to have the cotton hauled from the compress to Argenta?

A. Yes.
Q. As the cotton came in?
A. Yes; as it was ready for shipment.
Q. Remember whether the old contract was referred to or not?
A. I don't think it was. We had about agreed on what we wanted here. We submitted it and it was satisfactory.
Q. Don't you remember that there was a reduction in the amount to be paid per 100 from 15 to 13 cents?
A. Not that season.
Q. When was that made?
A. I think the season before.
Q. That was made with the oil and comp. Co.?
A. I suppose so.
Q. Were you in the cotton business before you became a director in the Union Compress Company?
A. Yes, sir.
Q. Had it been the custom before the organization of that company for cotton-shippers to deliver cotton here at the foot of Main St. for removal to Argenta for compression?
260 A. Yes, sir; I think they had the machinery in Little Rock at that time.
Q. You knew the terms for which the old company was getting the cotton transferred?
A. Not particularly. I knew about what they were. I had no business with the compress then.
Q. When you say that they merely made you a rate do you mean by that that they left the cotton there and took it whenever they pleased?
A. There was not anything said about that.
Q. They were to haul the cotton across from here to Argenta?
A. Yes, sir.
Q. They were to furnish cars, were they?
A. Yes, sir.
Q. And you were to load it, were you?
A. Yes, sir.
Q. And unload it over there?
A. Yes, sir.
Q. And reload it when it was compressed?
A. Yes, sir.
Q. And to insure it for the benefit of the R. R. Co.?
A. Yes; for the benefit of whom it may concern.
261 Q. How much were they to pay you for all that?
A. 13 cents per 100. Didn't include the transfer, though, from here to Argenta.
Q. You mean the $2,00 per car was in addition to the 13 cents?
A. Yes, sir.

SAM. O. SMITH testified for defendant:

Q. You stated the other day that you were the secretary of the compress company?
A. Yes, sir.

Q. And that the compress company was alone in charge of its warehouse at the foot of Main street?

A. Yes.

Q. I wish you would state how the cotton was loaded, and by whom, on the cars at the foot of Main street, and by whom unloaded when it arrived at the compress across the river.

A. The Union Compress Company loaded it at the foot of Main street and unloaded it at Argenta. After the cotton was compressed they loaded it again into the cars on the railroad.

262 Q. Did the R. R. Co. have an agent or representative at the compress company, at its sheds at the foot of Main St.?

A. No, sir; none whatever.

Q. Was any way-bill issued by the railroad company to the compress Co. for cotton that was hauled across the river?

A. None whatever.

Q. Who kept account of the cotton loaded on this side and out on the other?

A. The compress Co. They had a small book with a stub receipt. They took the number of the car, the initials of the car, and the marks and number of bales on each. They gave the slip to the yard master or the person who pulled the train out; he delivered it to the Union Compress Co., showing what the contents of the car was.

Q. You had a man that would take a list of the bales put in the car, and he would give that to the man who took it across and ask him to give it to the agent of the compress at Argenta, and that man would check it by the list made by the agent of the compress

263 company at the foot of Main street?

A. Yes; that is correct.

Q. The railroad simply furnished cars—an engine to haul the cars?

A. Yes, sir.

Q. State whether any distinction was made in the loading of cars between the cotton to be carried by the Iron Mountain and the cotton to be carried by the Memphis road or whether it was loaded together.

A. No distinction was made, sir.

Q. One car would contain cotton for both roads?

A. It could have done so.

Q. Wasn't it the habit just to roll it in?

A. That is my understanding of it.

Q. I wish you to state in regard to the character of the season. State, if you have any means of knowing, the increase in the receipts of cotton at the time this fire occurred as between that year and other years just previous.

A. The increase of receipts at Little Rock from the 1st day of Sept. up to and including the 14th day of November, 1887,

264 were about 6,000 bales in excess of any previous year.

Q. And what was it generally throughout the country?

A. At the ports of the United States, in round numbers, 475,000 bales increase.

Q. Was there the same relative increase at the stations along the railroads through the State?

A. I presume there was. Every point at which a record was kept shows a large increase.

Q. And not only throughout the State, but throughout the entire South?

A. Yes, sir; on account of the early maturity of the crop.

Cross-examination:

Q. You say the R. R. Co. had no interest in the compress Co.?

A. No, sir.

Q. At no time?

A. No, sir.

Q. Did they have an agent over at the compress Co.?

A. We had a joint agent over at Argenta.

265 Q. What was his business?

A. To load the cotton after compression into the cars for shipment.

Q. What did you call him?

A. Loading clerk.

Q. The compress company paid one-half his wages and the Iron Mountain the other half?

A. That is about the way it was; yes, sir.

Q. There were about 6,000 more bales of cotton received here that year than had been received any previous year. Where was the cotton received here in 1887 shipped from to this point? Where was the stock of cotton that was here shipped from into here?

A. Well, it came in from wagons.

Q. Where was it when the bills of lading were given?

A. In the sheds at Main St. and partially at Argenta.

Q. I am talking about that at Little Rock, not at Argenta. What was the number of bales received here up to the 14th of November, 1887?

A. About 35,000 bales, I think, by the exchange records up to and including the 14th of November.

266 Q. Where was that principally received? Wasn't it at the compress shed at the foot of Main street?

A. Yes, sir—that is, after the cotton was marketed here, purchased by the buyers, it was generally carried to the shed at the foot of Main street.

Q. Wasn't it all carried there except some 50 or 60 bales of it?

A. No, sir; the Memphis & Little Rock road must have taken 1,200 bales. I think they took about 900 from us a few days before the fire.

Q. Why did they do it?

A. The shed at Main street after 3rd of November received very little cotton. They were clogged, and this cotton was for very prompt shipment, and we had to ship it under contract, and they had allowed us to put in, I think, between 300 and 400 there five or six days before the fire and furnished cars for us to load it in on

account of its being a prompt shipment. The remainder of the shipment we carried to the Memphis & Little Rock road.

Q. How many bales did you say?

A. I think about 800 or 900 bales—that is, the transfer
267 company took it to the lower depot in place of Main street.

Q. Where was it from?

A. From our yard.

Q. Owing to the fact that you could not get cars to take it off from the Iron Mountain road?

A. Yes, sir; they furnished all they could, which was six or eight; we gave them enough to load them, and the remainder we took to the Memphis road.

Q. How many bales were received elsewhere in the city by the Iron Mountain road?

A. Only about fifty that I know of.

Q. How many bales cotton shipped in 1888 up to the 14th day of November, do you know?

A. Yes; I can tell you; 28,537 bales.

Q. Up to what time?

A. Up to the 14th of Nov., 1886, and from the 1st of Sept.

Q. Did it become known early in September that the cotton was maturing very rapidly?

A. Yes, sir.

Q. Everybody knew it was coming in unusually fast?

268 A. Yes, sir; during the month of September.

Q. Same in October?

A. Yes; but not in the same rate of increase.

Q. But the facts were well known?

A. Yes.

Q. Can you give me the receipts for September, 1886?

A. No, sir; I have not got them; I consolidated my statement.

Q. Have you got the receipts for September, 1887?

A. No, sir.

Q. I understood you to say that the rate of increase during October and November *were* not so rapid as during September.

A. I can give you an idea from the port statements; it has been in the same ratio.

JOHN G. FLETCHER testified for the defendant:

Q. What business were you engaged in in 1887?

A. Cotton, principally.

269 Q. How long have you been engaged in it?

A. Twenty years or more.

Q. State to the jury how the cotton season, as to advancement, as to the early gathering and marketing of the cotton crop in that year, compared with previous year.

A. That was a dry fall; cotton opened very rapidly and was moved very rapidly.

Q. About how much difference in the season up to the middle of November?

A. It was generally considered about three weeks earlier than usual.

Q. Was it considered an extraordinary season?

A. It was; yes.

Q. About three weeks earlier than usual?

A. That was the estimate.

Q. All over the State?

A. Yes.

Q. Had you ever known of such a rush prior to that?

A. I don't think I had. Receipts were enormous here and freights were hard to get at that time.

Cross-examination:

270 Q. Did the cotton crop mature earlier than usual that year?

A. Yes; I think it did.

Q. It soon became apparent that it was going to be an early crop?

A. Yes.

Q. Pretty well known by the middle of September?

A. Yes.

Q. Came in very early and very generally?

A. Yes.

ASA R. BRAGG for defendant:

Q. What was your connection with the Iron Mountain road in the fall of 1887?

A. I was division freight agent at Little Rock.

Q. Are you acquainted with the Union Compress Company, with its warehouse at the foot of Main street?

A. Yes, sir; I think I was to a certain extent.

Q. Who was in charge and control of the cotton sheds at the foot of Main street in the fall of 1887?

271 A. The Union Compress Company, as far as my knowledge extends.

Q. Were you in charge of the freight business of the Iron Mountain road here at that time?

A. I was their contracting agent.

Q. Did your company have any agent stationed at that place or have any control over the cotton that was stored at that place?

A. None whatever.

Q. State whether way-bills were given by the R. R. Co. to the compress company for cotton that crossed the river to the compress under the arrangement between the compress company and the railroad company. State the mode of business in regard to that.

A. No, sir; not what we term in railroad parlance a way-bill.

Q. State what the course of business was.

A. The usual procedure there was when the shipper presented the Union Compress Company's receipts they were taken up and

the R. R. Co.'s b. l. issued in lieu thereof. Immediately
272 upon issuing this bill of lading we sent a notice to the Union Compress Company advising them that we had issued bill — lading on their receipts for the specified number of bales of cotton, giving the mark and giving the name of the party that presented the receipt. That was sent to the compress company, and on that was stated to be loaded for shipment over the Iron Mountain road.

Q. Is this the receipt referred to issued by the compress company?

A. Yes; this is the form.

(The receipt was then read in evidence as follows:)

LITTLE ROCK, ARK., ——, 188–.

Received by Union Compress Co.
From —— ——.
Account of —— ——.
For compression.
Storage after ten days will be charged.
Not responsible for any loss by fire.

Marks.	No. bales cotton.

Q. Did I understand you to say that when the owner of the cotton brought that to the R. R. Co. a bill of lading was issued?

A. Yes, sir.

Q. After the bill of lading was issued you say a notifica-
273 tion was sent to the comp. company by the R. R. Co.?

A. Yes; that is the form of the notice.

(Dray ticket and shipping order made a part of the evidence.)

Q. State whether the same kind of a receipt given by the compress company for cotton delivered to it at Argenta is like that which you have identified as the form of the one given at the Main-street shed.

A. The wording of the receipt is exactly the same; only a difference in the color.

Q. Was the same notification given by the R. R. Co.?

A. Yes, the same notice.

Q. Cotton was received by the compress company at its compress in Argenta, was it?

A. Yes.

Q. What is the first notification or information that the railway company would acquire of the fact that a shipper had cotton at the compress sheds at the foot of Main street?

A. This compress company receipt was the first notice when presented.

Q. State what was done in regard to removing the cotton
274 from the foot of Main street by the R. R. Co. to the compress in Argenta after you had issued bills of lading and given the notice to the compress company; state how the cotton was handled in your own way.

A. It was loaded by the Union Compress Company into cars for transportation to the compress at Argenta.

Q. Where were those cars?

A. On the side track.

Q. Were they set by the R. R. Co. on the side track?

A. Yes, sir.

Q. Then they were, of course, pulled by the R. R. Co. to Argenta?

A. Yes.

Q. What was done with it then?

A. The cars were set into the compress platform and unloaded there by the compress company.

Q. Did the R. R. Co. give the compress company any way-bill or receipt or anything of that kind for the cotton at the time they took it from the foot of Main St. to the Argenta compress?

A. No, sir.

Q. At what point did the R. R. company receive the cotton for shipment to its final destination after it had been compressed?

275 A. At the Argenta compress.

Q. Who loaded it into the cars?

A. The Union Compress Company.

Q. Did the same rule that you refer to apply to cotton that was to be shipped to its final destination on the Memphis & Little Rock road as it did to the Iron Mountain road?

A. The rule was exactly the same.

Q. Did cotton come in more rapidly the season of 1887 than the previous one?

A. Yes.

Q. To what extent did this affect the movement of it?

A. Had the effect of crowding the depots.

Q. How much earlier than usual was the crop?

A. About three or four weeks earlier.

Q. State to the jury whether, with the facilities had for moving cotton, if it had been an ordinary season, what the condition of affairs would have been—whether there would have been any blockade or any accumulation of cotton such as there were.

A. No, sir; if it had been an ordinary season with the in-
276 creased capacity for moving the business it would have been moved just as usual.

Q. Do you know to what extent the capacity for moving freight had been increased that fall?

A. They began to increase the car service in January or February; that was continued throughout the entire year.

Q. Can you state how many more cars there were in service at that time than the previous year?

A. Not exactly, but the Iron Mountain *pro rata*, I think, was

about three or four thousand cars of the increased capacity all over the system.

Q. You don't know about that; that is a mere estimate?

A. No, sir; I cannot say positively.

Cross-examined:

Q. Did you have control of the shipment of cotton from here to Argenta in the fall of 1887?

A. No, sir.

Q. Did you have anything to do with furnishing the cars here in Little Rock for the transportation of cotton from the foot of
277 Main street to the compress at Argenta?

A. No.

Q. Do you know what was really done in that matter yourself?

A. I know the cars were furnished.

Q. When were they furnished?

A. All the time.

Q. As fast as they were required?

A. So far as I know.

Q. Do you know that they were furnished in sufficient quantities for the purpose of moving cotton? Don't you know there was a blockade there?

A. No, sir; I can't say that I did know there was any particular blockade there, as far as my knowledge extends. I didn't examine the premises.

Q. Don't you know that there was a large pile of cotton in October and November piled up in the street?

A. There was cotton coming in and going out of there all the time.

Q. Do you know how many bales were billed to the Iron Mountain road at the time of the fire?

A. Yes, sir.

Q. How many?

278 A. You mean the number of bales at the time the fire occurred?

Q. Yes.

A. About 1,400 bales.

Q. You say there had been an increase of 3,000 or 4,000 cars on the whole system of the Iron Mountain road?

A. I said on the Iron Mountain proper. I mean from St. Louis to Texarkana.

Q. You stated about 1,400 bales had been billed. Wasn't it really 1,462?

A. I said probably a little more.

Q. Going back to the other matter, you say this was the whole Iron Mountain system. What was the whole Iron Mountain system?

A. I am speaking of the Iron Mountain from St. Louis to Texarkana.

Q. Didn't you say the whole system?

A. No, sir; only *pro rata*.

Q. How much?

A. About 4,000 cars. That, I think, was the increase in car service.

Q. Don't you remember that during those months of which I spoke there was a great complaint for want of cars here?

A. No, sir; not for the transportation of cotton.

279 Q. Hadn't there been complaint about the delay in transporting cotton in 1886 at the foot of Main street?

A. Not to my knowledge.

Q. Never heard of any complaint before 1887 at all, did you?

A. I had nothing to do with the movement of cars; no, sir; not under my jurisdiction.

Q. According to the stenographic report of your testimony taken in another trial when this matter came up you were asked this question: Were you applied to as an official of the Iron Mountain road by the compress company at different times in October and November, 1887, to furnish cars? Then this question was asked you: Did any one make complaint to you of insufficient transportation from there? The answer is: I have heard a complaint that the cars are not furnished as promptly as they might be. Is that a correct statement of the facts?

A. I didn't say shortage of cars for cotton.

Q. Shortage of cars generally. What kind of cars was the complaint about then?

280 A. We had some little complaint from the lumbermen.

Q. There might have been a good deal of complaint about the cotton and you never known it?

A. Yes; there might have been to the superintendent of transportation.

Q. The R. R. Co. and the compress company had an agent over at Argenta for the purpose of reloading the cotton, had they not?

A. No, sir; they have no agent.

Q. An employee?

A. There was a loading clerk there who was under the supervision of the compress company. The R. R. Co. assumed a portion of his salary for loading cotton, loading at Argenta, and in transit.

Q. If you had nothing to do with this particular work of transportation, how do you know what they had?

A. Because I have filled the local agent's office myself and know that no such arrangement was carried on.

Q. Did you ever go with a load of cotton from the foot of Main street to Argenta?

A. No.

Q. Had nothing to do with that at all.

281 A. No; I had no occasion to go over.

Q. When the owners of the cotton came to the railroad company to get cotton billed through what did they bring with them?

A. This receipt.

Q. And upon that you issued bills of lading?

A. Yes, sir.

Q. And then you kept this receipt, I suppose?

A. They were cancelled; yes; at that time they were kept.

Q. Were they preserved for settlement with the compress company?

A. No, sir; they were taken up because we had issued a receipt in exchange for them.

Q. How much of the crop of 1887 that was shipped on the Iron Mountain was received at the foot of Main street?

A. None of it.

Q. I want to ask what portion of the cotton was billed at the foot of Main street. How much of it was received at the foot of Main street and how much at the other depot?

282 A. I could not tell you the number of bales.

Q. Don't you know that all except a small part of the bales was received at the foot of Main street? I think most of the cotton you issued bills of lading for was there.

A. No, sir; there was a great portion of it—those red receipts—was in the Argenta compress.

Q. Don't you know that nearly all of it was shipped from the foot of Main street, in Little Rock?

A. Nearly all we issued bills of lading on was at the foot of Main street—that is, that I issued bills of lading on.

Q. Where did they bring the empty cars from usually to the siding here at the foot of Main street for the reception of cotton?

A. All over the yard.

Q. Where is the yard?

A. The yard extends from the Ft. Smith crossing east and west a distance down to where the compress of the Union compress is.

Q. How were the cars hauled over from the foot of Main street, by switch-engine?

A. I suppose they were.

Q. Was a switch-engine used only for that purpose?

283 A. A switch-engine does all kinds of work.

Q. Where did it cross—at the upper or lower bridge?

A. I could not say, sir; I don't know.

Redirect examination:

Q. You say there was some complaints from the lumbermen that fall in regard to the shortage of cars. Do you know of any reason why their cars were short?

A. Yes, sir; the cars at that time were nearly all being used in the transportation of cotton.

Q. Were you giving the cotton the preference over the lumber?

A. Yes, sir; we had to do it.

Q. And that was the reason of the shortage?

A. Yes.

Recross-examination:

Q. Have you got a list of the bills of lading and the dates of the shipment?

A. Yes.

Q. Whereabouts?
A. In my office, I think.
Q. Can you furnish a copy?
A. Yes, sir. (This statement was never furnished.)

284 Q. Did they continue to issue bills of lading down to the day of the fire?

A. Yes; I think there was one issued the day of the fire. There was over 1,400 bales burned upon which the Iron Mountain had issued bills of lading. All of the bills of lading for this 1,400 bales had been issued subsequent to October 20th, and between Nov. 1st and the fire there was 1,100 bales of this cotton for which bills had been issued during November, so that there was only 500 bales burned upon which bills of lading had been issued between the 20th of October and the 1st of November.

Here the defendant introduced 10 or 15 witnesses tending to show that the fire occurred at about half past four p. m. on the 14th of November, and that none of defendant's trains or engines had passed along that track for three hours prior to the fire, and that the fire was not set out or created by reason of any spark or negligence in that regard on the part of the railway company defendant and its employees or defects growing out of any of its machinery.

The testimony, being voluminous, is not given.

285 W. C. DOTTERER testified for defendant:

Q. What was your business at the time of the fire at the foot of Main street?
A. I was local freight agent of the Iron Mountain road.
Q. Where was your place of business?
A. At the foot of Rock street.
Q. Do you know where you were at the time the fire broke out?
A. In the Argenta yard; had been through the Baring Cross yard.
Q. State what the first thing was called your attention to the fire.
A. It was in passing through the Argenta yard; my attention was called by the foreman of the switch-engine, Dougherty. I did not locate it, though, until I was on the bridge.
Q. What did you do then?
A. I immediately came over to this side of the river to get the cars away, etc.
Q. Do you know whether or not the compress at Argenta was crowded at that time?
A. Yes, sir; the Argenta compress was very much crowded.

286 Q. Please state with what facility and celerity cotton carried over from the foot of Main street was unloaded at the Argenta compress.

A. Very slowly, indeed; we had some eighty cars tied up in Baring Cross yard.
Q. Why were they tied up?

A. Because they could not get the cotton out of the Argenta compress in order to take more in.

Q. Were you the local freight agent?

A. I issued way-bills for freights that went out by the Iron Mountain road.

Q. All issued in your office?

A. Yes.

Q. Issue any bills of lading for cars from the foot of Main street to Argenta?

A. No, sir.

Q. You made out your bills at the rate of $2.00 per car?

A. Yes, sir.

Q. You didn't know what was in the cars?

A. No, sir.

Q. Did you give a receipt for what was in it?

A. No, sir; just switched it at $2.00 per car.

287 Q. Did the compress load the cars here and unload them across the river?

A. Yes, sir.

Cross-examination:

Q. How many cars were tied up in Argenta at the compress?

A. As near as I can recollect, about 80. The reason I have such a distinct recollection that is what took me over the river that day.

Q. Did you count them?

A. No, sir; I had reports daily. I knew the cars were there.

Q. How did you know it?

A. I may say from personal observation; the report would show there was about 80.

Q. Were they loaded or unloaded?

A. They were loaded.

Q. Where had they been taken from?

A. Some of them had been taken from the foot of Main street, others consigned to the compress at various points along the line.

Q. Was the cotton compressed or uncompressed?

A. Uncompressed.

Q. Hadn't been unloaded?

A. No, sir.

288 Q. Why hadn't it been unloaded?

A. The Argenta compress was too crowded to take it in.

Q. Don't you know as a matter of fact that there was a large amount of compressed cotton lying all around, and that these cars could not be carried into the proper place to be unloaded because the R. R. would not carry off the compressed cotton?

A. There was considerable compressed cotton there.

Q. How many bales of compressed cotton were there over there on the ground ready for shipment?

A. I cannot say.

Q. Did you look at them; cannot you give us an estimate?

A. No, sir; I cannot.

Q. Do you know how long it had been there lying on the ground?
A. I don't know.
Q. Was the platform crowded?
A. Yes, sir.

Redirect examination:

Q. You are in the employ of whom now, Mr. Dotterer?
A. The Union Compress Company.

289 THOMAS BARBER testified for defendant:

Q. Is your name Thomas Barber?
A. Yes, sir.
Q. Where were you working at the time the fire broke out in the compress shed at the foot of Main street, in the fall of 1887?
A. Sitting down-stairs on the lower platform, leaning against post.
Q. On the compress shed?
A. Yes, sir.
Q. How far were you sitting from the steps that go down from Main street to the lower platform?
A. As near as I can guess, it was about 40 feet from those steps.
Q. In what direction, east or west?
A. West of the steps.
Q. State to the jury all you know in regard to the origin of the fire; everything you saw while you were sitting there; begin at the beginning.
A. I was sitting down there talking to another man, Sam. Pryor. I heard some one holler and I looked up; saw it was Sam. He hollered and jumped off the platform like I am sitting on this
290 chair and ran down about 30 feet and turned into a little gangway that ran in across toward the trestle and led across to the steps that you come up and found a bale of cotton on fire, and we grabbed hold of it and threw it down, and in trying to throw it down it was jammed. There were two bales there, one on the outside; that one was rather tight. There was 5 bales there, three on this side and one on the outside; we pulled it down. Of course, it was burning where they had taken out a sample. In pulling down there came a little puff of wind; that striking the cotton that was loose and dry flashed over 5 or 6 bales before you could speak, and then I told Sam. to run and holler fire, and I stayed there and tried to fight it out; a lot of men working in the east shed upstairs came running down there; we tried to throw it out; we could not do it; the fire was spreading very rapidly, more east, and we ran back to get hold of a pair of hose to turn the water on.
Q. Where was that hose?
A. At the west end of the shed.
291 Q. State where, with reference to where the old compress machinery had been.
A. Just about 20 or 30 feet from where the old compress had been

standing. It stood west and kind of southwest; back kind of from the compress. That was where the hose was.

Q. Was there any fire in there when you went to get that hose?

A. No, sir; no fire there.

Q. What did you do with the hose?

A. We got them down, but there was so much mud it blocked them up; it would not spurt any water; fire got so hot we had to go away from there. We ran down to the west corner of the compress. I think there were 3 or 4 bales there. We rolled them on the railroad track; could not do any more; the fire was so hot. We ran back to the west end, near where the compress machinery sat.

Q. You attempted to throw some cotton off there?

A. We did throw off three or 4 bales.

Q. How did the fire spread—rapidly?

A. I should think it did. In 10 minutes the whole block was on fire.

292 Q. In what direction did it spread? In any particular direction?

A. It spread everywhere; went clean to the water's edge as quick as it did any other way.

Q. Did you see any person pass just before this fire occurred? State what you saw in that respect—who they were, or, if you don't know who they were, describe them.

A. Two boys who had been in the boat-house all evening came out and said something to me; I don't know what it was; one was smoking a cigarette and the other one had a cigarette in his mouth; he had not lit it yet. As the two started to go in this gangway where this cotton was set up on end I saw that one on the side next to where the bale was striking a match. Of course where I was standing I could not see what he did, but he went in and it was not a minute before the fire flashed out.

Q. Did you see the boy strike a match?

A. Yes, sir.

Q. You saw the other boy smoking a cigarette?

293 A. Yes, sir.

Q. Just after he struck the match came the blaze?

A. Yes, sir.

Cross-examination:

Q. You were not connected with the compress in any way?

A. No, sir; not at that time.

Q. Was it a frequent occurrence to see men smoking backwards and forwards toward that passage-way?

A. Walking just as if they were on other streets.

Q. Was it a common thing to see people smoking, and those boys smoking at that particular time did not attract your attention, did it?

A. Of course I knew they were smoking. Of course I always knew it was dangerous for anybody to strike matches around there. I have known them to strike matches on the bales of cotton.

Q. Right along on that passage-way?

A. Anywhere along on that passage-way. I have wondered that they did not set the shed afire long ago.

294 Q. Did you ever see it set afire before?

A. No, sir; I never saw it set afire before; but I have heard say it had been.

Q. Heard who say it?

A. Lot of people who were working around there.

Q. Railroad folks?

A. Not railroad men; men who had been working around there.

Q. Was it a common thing to catch fire?

A. No, sir; it was not a common thing; but of course it was dangerous from the way they used fire around there. Not many people know.

Q. Can you give us some ideas of those boys; pretty well grown, were they, or little bits of kids?

A. You might say just devilish little boys; not big and not small.

Q. Just about a good size to be devilish?

A. Yes, sir.

Q. Were they 10, 12, 14, or 16 years of age?

A. Along about 12 or 13.

Q. How long had you been there in the compress shed?

A. I had been there pretty close onto an hour.

295 Q. Had you seen an engine pass?

A. No, sir; I saw only one engine going east; that passenger train.

Q. That was the last one you saw, was it?

A. Yes, sir.

SAM. PRYOR recalled for defendant:

Q. What was your employment at the time the fire occurred in the cotton at the compress sheds?

A. I was working and helping load cotton; watchman; day watchman.

Q. Where were you at the time the fire broke out?

A. I was setting upon the cotton down on the lower platform.

Q. Who besides yourself was there?

A. No one.

Q. Was there any colored man around there?

A. Barber had been there a few minutes, but he had got out of my sight somewhere. He soon appeared again.

Q. What was the first indication you saw of the fire? Tell
296 the jury all about where the fire caught, and how it caught, and all you saw of the origin of the fire.

A. It caught fire at the foot of Main street. A couple of little boys came from the boat-house smoking; one of them took the cigarette out of his mouth and threw it down at his side, and it dragged into a sample hole; the wind was blowing very strong; he hadn't got to the top of the steps before it commenced blazing.

Q. Where was the bale located?

A. On the right-hand side of the steps going down to go to the boat-house.

Q. On the east side of the steps?

A. Yes, sir; east side, in the street.

Q. There is a turn in the steps there, isn't there; you go down and then turn?

A. Yes, sir; then they turned the other way.

Q. I want you to state how that bale was located with reference to the other bales. How far from the elbow that is made by the bend in the steps?

A. Well, I don't recollect exactly. It was about the 3rd or 4th bale.

Q. Where was you standing at the time this occurred, at
297 the time the boy, you say, set the cotton on fire?

A. Sitting upon a ball of cotton on the edge of the platform, about 20 feet from where the fire occurred.

Q. And you saw the boy from where you were sitting?

A. I could see the boy on account of the steps going down under the railroad; I could see from that.

Q. You say there were two boys?

A. Yes, sir.

Q. Do you know whether either of them had a match in his hand or not?

A. I don't know. They lit the cirgarette before they came upon the platform.

Q. You didn't see one strike a match?

A. No, sir.

Q. Was the boy you refer to in front or behind?

A. They were side and side.

Q. What order did they come in before they separated on the steps?

A. One ran in front of the other, and then they went up abreast.

Q. But you say one came up the steps in front of the other, and then they went up side by side?

298 A. They came up to the steps that way, coming up on Main street side and side towards the cotton, and then went up the steps one ahead of the other.

Q. Did you notice what order they came here before they got to the steps? I don't mean the steps coming up on Main street, but the steps that left the railroad track.

A. I didn't notice very particular whether they were in front of one another. They came up playing together.

Q. What did you do, Mr. Pryor, when the cotton caught?

A. I jumped down and ran up the steps and hollered "Fire" three times.

Q. What did you do then?

A. Came back. When I got back there Barber was there, and he says, Less throw the bale over, and we caught hold of it; tried to roll it onto the railroad track; flame was so hot we could not do it. About that time the other men had come down and got the hose

belonging to the Union Compress Company, in the shed, and turned on the water, but, the pipe being full of mud, we could not get any water.

299 Q. Did you do anything towards attempting to put the fire out before you tried to roll the bale off?

A. No, sir; I could not do anything then.

Q. Did you see Peter Cobb there?

A. There was no one down there that I saw when the fire took fire.

Q. After you called, did Peter Cobb come?

A. Yes, sir; after I called and hollered fire.

Q. Who else beside Cobb do you remember?

A. Dick Jones and a man by the name of John Edwards.

Q. I want you to state whether there was any fire in the west end of the compress at the time this fire started?

A. No, sir.

Q. How do you know that?

A. Because I was sitting up where I could see all over the cotton.

Q. No fire in the west end?

A. No, sir.

Q. How long prior to the origin of the fire had it been when an engine passed there?

300 A. I don't hardly remember; as near as I can recollect, about an hour or hour and a half.

Q. What kind of an engine?

A. I think it was a passenger.

Q. What direction was it going in?

A. East—down the river.

Cross-examination:

Q. Where were you at the time the fire took place?

A. I was sitting right about there on the edge of the platform, on top of the cotton.

Q. Were there several bales of cotton there?

A. Yes, sir; it was full.

Q. Where was Barber sitting?

A. Down under on the railroad. I could not see him at that time.

Q. What were you doing there?

A. Watching the cotton. I was employed by the Union Compress Company as day watchman.

Q. What time was your attention first called to these boys?

A. I was noticing the boys in the boat-house. They had been throwing water out of the windows onto the ground. I sup-

301 pose it was some five or six minutes before they coming running out of the boat-house, playing, and came to these short steps side by side and then one went up before the other.

Q. Had you seen them smoking before they came out of the building?

A. No, sir.

Q. When they came out were they smoking?

A. Only one was smoking.

Q. Were you looking at them when they went to this gangway?

A. Yes, sir.

Q. You say you saw him throw the cigarette against the cotton?

A. He took it out of his mouth and threw his hand down, and he did not get to the top of the steps before the cotton commenced blazing. The wind made a kind of a whirlwind.

Q. When you saw him throw his hand down did you see the cigarette come in contact with the cotton?

A. Could not see through him; his hand was on the side opposite from me.

Q. What made it burn so quick?

A. There was a very strong wind.

302 Q. Was it almost immediately after the boy threw his hand down that the fire blew up?

A. Yes, sir.

Q. Did it first begin to smoke or break out in flame at once?

A. It broke out in flame.

Q. Which direction did the flame come?

A. Right straight up. Kind of whirled around and went straight up. It ran over the bagging.

Q. It ran very fast, didn't it?

A. Yes, sir.

Q. How far was it from the boat-house up to the point where the cotton took fire?

A. 50 or 60 feet; maybe not so far.

Q. That street is about 60 feet wide, isn't it—Water street?

A. There is no street; only a double track between the platform and the boat-house.

Q. The boat-house not on the same side of the street as the shed?

A. No, sir.

Q. I don't believe you answered my question exactly, whether you saw when he threw his hand back whether the cigarette

303 came in contact with the cotton, did you?

A. I could not see through the boy to tell whether it did or not; there was no other way for the fire to start.

Q. He had the cigarette in his left hand?

A. Yes, sir, in his left hand as he went up, and he threw his hand down that way.

Q. Of course, you could not see through him to tell exactly when it struck the cotton.

A. No, sir.

Redirect examination:

Q. What part of the bale did the fire originate in?

A. At the sample hole.

Q. How long had that cotton been in that condition, piled up along there on that platform and in the street?

A. Some of it two or three days.

Q. Hadn't some of it been there a good deal longer?

A. Some of it had been there a week.
Q. How about this in the street?
A. That had been there 2 or 3 days, I guess.
304 Q. Wasn't it a very dry spell of weather?
A. Yes, sir, very.
Q. Wasn't it a very dry time?
A. Yes, sir; we had no rain for a long time.
Q. Was it very common during the time that this cotton was piled out there for people to come down smoking?
A. Yes, sir.
Q. Ever remonstrate with anybody for smoking?
A. Not in that gangway.
Q. Had cotton in there been sampled?
A. Yes; all the cotton down on the platform had been.
Q. Was loose cotton sticking out in spots?
A. Yes, sir; a good deal of it was.
Q. How long had you been in the employ of the compress company?
A. I don't recollect what time I went; I think it was along about in last September.
Q. What business are you engaged in now?
A. Working in the compress.
Q. The same compress company?
A. Yes, sir.
305 Q. Were not these cotton bales generally covered with lint at the time?
A. No, sir; there was no lint; only lint over the bagging. You see, cotton bagging, when it is dry, burns quicker than cotton does.
Q. The fire spread very rapidly?
A. Yes, sir.
Q. How long a time did you stay there during the day as watchman? What hours?
A. Until 6 o'clock in the evening.
Q. What time did you go on?
A. 7 a. m.
Q. Who stayed there at night?
A. Mr. Wright.
Q. How long before the fire had any cotton been taken out from there?
A. Three days; maybe four.
Q. How much did they take out then?
A. I don't know. I don't recollect how many cars we did load.

PETER COBB testified for defendant:

Q. Where were you working at the time of the fire in the compress at the foot of Main street in the fall of 1887?
306 A. At the compress; for Union Compress Company, in handling cotton.
Q. Where was you when the fire broke out?
A. Standing near the warehouse door; upstairs.

Q. What street did that door open on?
A. Main street.
Q. What was the first notice you had of the fire?
A. Sam. Pryor and a couple of little boys and a lady came running up Main street.
Q. How did that notify you of it?
A. They were hollering; Sam. was roaring.
Q. What was he saying?
A. He hollered fire.
Q. Where was he when he hollered fire?
A. Just come up from the fire; down the steps to the first floor.
Q. What did you do?
A. I ran down there.
Q. Tell the jury what the condition of things where the fire was and to what extent burning.
307 A. When I got down there there seemed to be 2 or 3 bales of cotton on fire.
Q. Where were those bales located?
A. On the right-hand side coming down the steps—in the street.
Q. What did you do when you got down there?
A. Tried to put it out with my hands and hat first.
Q. Anybody besides you and Sam. Pryor there?
A. I noticed Dick Jones and John Edwards.
Q. Go ahead and tell what you did then.
A. At the time I came down I saw the fire was spreading. I jumped up on top of the cotton, ran west in the shed to get the hose—the hose was the first thing I thought of—then turned them on and the water would not run. I ran back, then, right around from the fire; tried to throw a couple of bales off the platform; the fire spread so rapidly I had to jump down off the platform and run straight down to the river.
308 Q. How long was it from the time that you got down there and attempted to use the hose before it spread all around?
A. About 7 or 10 minutes, I guess.
Q. Had you been in the compress shed during the day?
A. Yes, sir.
Q. How long since you had left it?
A. It could not have been more than 4 or 5 minutes, I guess.

J. A. GINNOCHIO testified for defendant:

Q. State where you were at the time the fire began in the compress shed at the foot of Main street in the fall of 1887.
A. I was in the boat-house of the Athletic association.
Q. How long had you been there?
A. I should judge about half an hour. I could not tell exactly.
Q. What were you doing there, Mr. Ginnochio?
A. Playing ten-pins at the time.
Q. Who were with you?
309 A. Horace Kimball and Dederick Cantrell.
Q. What was the occasion of your first noticing—how was your attention first called to the fire?

A. One of the gentlemen hollered that they heard some one give the alarm. Some one looked out of the east window and saw the fire and gave the alarm. From there we went into the director's office. From there we noticed the fire.

Q. You say you were in the bowling alley when Mr. Kimball raised the alarm?

A. Yes, sir.

Q. Go ahead and tell what you did, etc.

A. As soon as we saw there was a fire we ran up to the director's window. There were windows in that room facing both east and south, and of course from the south window we could see the fire; looked at that time 15 or 20 feet from us, perhaps a little further.

Q. How large a fire was it at that time?

310 A. I think there was about one bale of cotton on fire.

Q. Where was the bale of cotton on fire?

A. On the east side of the little platform, or, rather, the flight of stairs that led up into the compress, and about the second or third bale—I could not say which—from the end of the platform.

Q. Go on and tell what you and the others did.

A. We had no idea of the boat-house being in danger, so we thought perhaps a little water could put out the cotton on fire. We went into the boat-house. We took a large tin bucket. By the time we got down there the fire had spread all over the bales of cotton. Then we attempted to put the hose on, but the heat was so intense that we went down below and began to carry the boats out.

Q. Did you see any boys around the Athletic Association building awhile before that fire?

A. When we went down there my recollection is we found

311 two. They were in a different part of the building.

Q. Do you know what became of them?

A. No, sir; I know they left while we were there.

Q. Did you see any men about that fire when you looked out?

A. Yes, sir.

Q. What were they doing?

A. I think there were two of them attempting to put out the bale of cotton that was on fire.

Q. In what way?

A. I saw one have his hat trying to smother the flame.

HORACE KIMBALL testified for defendant:

Q. State where you were at the time the fire broke out in the cotton at the foot of Main street spoken of.

A. In the basement floor of the building known as the Athletic Association building.

Q. How long had you been there?

A. About 20 minutes or half an hour.

Q. Who were with you?

A. Ginnochio and Cantrell.

312 Q. What were you doing there?

A. Playing cocked hat.

Q. What was the first intimation or notice of the fire?

A. Three of us were rolling. I heard a cry of murder or fire or something and ran to the north door, but saw nothing there, and then ran back and looked out of the window on the east side and saw two men running towards a bale of cotton in the old compress shed on the lower floor.

Q. Where was the bale of cotton?

A. In the gangway in the street.

Q. East or west side?

A. East side.

Q. You saw that from the east window in the basement room?

A. Yes, sir.

Q. What did you do then?

A. The first thing I told the other gentlemen to look at the fire, and then we got our hose out to save the building if we could. We attached the hose and took it up to the porch above.

Q. Did you see any men out there?

313 A. Yes, sir.

Q. Did you see any men when you first looked out there?

A. Two or three.

Q. What were they doing?

A. Trying to smother the fire with their hats.

Q. When you got upon the gallery, to what extent had the fire spread?

A. Considerable; a space of 20 feet. I know of no fire in the west end of the compress. None that I saw. I could see this bale east of the boat-house. There was a fire in that bale.

Q. What direction was the fire spreading in?

A. In all directions very fast.

Q. What part of the boat-house did it come in first?

A. The south side.

Q. Which end?

A. I should judge the south or east, right on the southeast corner of the boat-house. I don't remember looking out of any window. When I got down there the fire was all over the south side of the boat-house.

Q. State what you young men did.

314 A. We tried to get out our furniture. We had a desk upstairs. While we were doing that it became so hot we could not get it, so we went down to get the boats out, in a room in the basement on the north side.

Q. Did you see some boys down there?

A. They were, I think, when we first came.

Q. Do you know what became of them?

A. I don't know.

Q. How many were there?

A. I think two or three. They left before we began rolling. Some boys were always around there.

DEDERICK CANTRELL testified for defendant:

Q. State where you were at the time the fire broke out at the foot of Main street.
A. At the Athletic Association building.
Q. Who was with you?
A. Ginnochio and Kimball.
Q. What were you doing there?
A. Rolling cocked hat.
Q. What part of the building were you in?
315 A. The bowling alley on the first floor.
Q. What was the first notice you had of the fire?
A. I think it was an alarm by Mr. Kimball.
Q. Then what did you do?
A. I think at first he thought it was some one in the river, but afterwards discovered that it was a fire, and called our attention to it, and we went upstairs to see the fire.
Q. Where was it at that time?
A. My remembrance of it is that it was a little southeast of that point and in Main street.
Q. State with reference to the steps that came from Main street down to the second platform. Was it east or west with reference to those steps?
A. Probably the cotton was on a line with the few steps to the right of the gangway, going towards the river, east of the passage-way.
Q. How much cotton was on fire?
A. One bale.
Q. Did you see any person about it?
A. Yes; two or three men trying to put it out.
316 Q. Could you see over on the west end of the compress shed? Was there a window on the south side of the directors' room or did that porch extend down to the corner?
A. Yes, sir; you could go out on the porch and see to the west end.
Q. Was there any fire in the west end of the compress shed?
A. I didn't see any.
Q. Would you have seen it if there had been some?
A. I think I would.
Q. Please state how rapidly the fire spread.
A. Very rapidly.
Q. In what direction?
A. In every direction; all around; everywhere.
Q. What did you do after you had come upstairs and saw where the fire was?
A. I think the first thing we tried to get some water; thought maybe we could wet the side of the boat-house and keep it from taking fire; soon abandoned that idea, and tried to get the
317 furniture out, but had to give that up, and then went downstairs after the boats.

C. W. HEGNEMBOURG testified for defendant:

Q. Were you connected in any way with the Iron Mountain R. R. in 1886 and 1887?

A. Yes, sir.

Q. What was your relation to that company?

A. Car-service agent.

Q. What duties did your position impose upon you?

A. The distribution of cars for traffic upon all portions and divisions of the road and branches.

Q. State how the freight-car service in regard to the number of cars compared in the fall of 1887 with what it was in the preceding year.

A. I would like to answer your further remark by saying that in 1886 I was secretary for the general superintendent. I would say that in 1887, as compared with 1886, that the Iron Mountain
318 was furnished with from 20 to 30 per cent. more cars in 1887 than in 1886.

Q. State to the jury all the facts in regard to the matter—the number of cars put on the line in 1887, what was there in 1886, and what cars were provided for the business of 1887.

A. During 1886 possibly everybody remembers that there was a strike upon the roads of the country; and for the spring of 1886 the traffic—freight traffic—particularly upon the Iron Mountain road, was very seriously interfered with, and it was not until May of that year that traffic was fully resumed. We were very badly pressed for cars for all classes of traffic during 1886, and, anticipating the increased volume of business all over the road, the company in the fall of 1886 contracted for a large number of new cars, besides those they had contracted for previously, and the contracts were let in the months of October and November, 1886, for 4,155 new cars, anticipating the increased business that would come from the
319 country. Of that number of new cars—the car works of the country were at that time overrun with work, and it was very difficult to make a contract with any particular car works to furnish the cars in the time needed, and the contract was distributed between four different car manufactories, providing that they should deliver the cars after a certain day at so many per day. The last were delivered in June, 1887. Of that number of new cars over 3,000 of them were sent in 1887 to the Arkansas division of the Iron Mountain road, in order to care for the cotton and the lumber business of this territory. In addition to that, from the information received from the people in managing the road at this end and from enquiries that we had made, as car-service agent I borrowed from different roads, our direct connections, for the movement of cotton more particularly, between August, 1887, and December,
320 about 10,000 foreign cars, which were moved here on the line of the Iron Mountain railroad to handle business of that year.

I would state further that, as secretary for the general superintendent in 1886, it was customary to anticipate what the traffic of the particular locality of the State would be, and by different en-

quiries from agents, too, — all the different towns and counties information was derived as to the anticipated business for the coming season. In 1886 I prepared for the general superintendent and general manager a statement as to the increased business anticipated from Arkansas and Missouri on the line of the Iron Mountain, particularly as regarded lumber and cotton. Of course, it was too far in advance to tell what the season would be as far as the cotton was concerned, but we asked particularly of the millmen their increased capacity, the number of thousands of feet of lumber on hand, and what they expected to do during the season. Upon that report was based the order to the car works for the increased number of cars.

321 Q. What did I understand you to state was the percentage of increase in 1887?

A. Fully 20 %, if not 30 %, on the line of the Iron Mountain.

Q. Did your duties make it necessary for you to be familiar with the volume of business, so far as it affected the car service?

A. My duty was particularly the distribution of cars and a knowledge as to the business on the roads on each division.

Q. Please state to what extent the facilities furnished in 1887 would have enabled the company to move the cotton crop expeditiously if the season had been an ordinary season.

A. If the season of 1887 had not been in advance of the regular years I believe that with the increased number of cars that we furnished the Iron Mountain, more particularly Arkansas, that there would have been no trouble in handling the business.

ROSE:

Q. How is that?

322 A. If the season of 1887 compared with 1886 with the increased number of cars that were delivered and furnished to the Arkansas line of the Iron Mountain railway I don't believe that we would have had much trouble in handling the cotton business.

Q. Something has been said in this case in regard to the shortage of the means of transportation furnished to the lumbermen during the months of October and November during several years. State to the jury if there is any special reason causing the shortage in those months as distinguished from the other months of the year.

A. As a general thing, the heavy shipments of lumber occurred about the fall, during the heavy cotton shipments, and it has been the policy and the practice of the roads since I have been with them to favor the cotton shipments, and all box cars for which the lumber dealers would ask during that season were turned into the cotton trade, and the lumber interests were cut short by the fact of turning the closed cars into the cotton trade instead of giving them to the lumber interests.

323 Cross-examination:

Q. Is that your signature?

A. Yes, sir.

Q. I understood you to say that in 1886 there was a strike upon the road and it interfered with the traffic. What time did it occur?

A. In March, 1886.

Q. How long did it last?

A. The strike actually lasted, without the movement of a train, until about April 4th.

Q. What time in March did it begin?

A. On the 4th or 5th; I think it was March 6th it became general.

Q. Traffic was resumed what day in April?

A. About the 6th; about 29 or 30 days the strike lasted.

Q. Was traffic interrupted after that date during 1886?

A. Not on account of the strike.

Q. Business being resumed in 1886, on the 6th day of April, was that a reason for the difficulty in getting cotton out in the fall?

324 A. During the strike in 1886 the engines were demolished; it took considerable time to get the equipment in order again; my recollection is that the percentage of cars unfit for service during 1886 exceeded any previous year in the history of the road.

Q. It was impossible to get the cars to transport the cotton by reason of the strike in the spring?

A. No, sir.

Q. State what you mean. You stated the strike in the spring interfered with the transportation of freight in that year; why was it the cotton was not moved in 1886?

A. I think it was.

Q. There was a great and unexpected increase of business in 1887 over 1886, you say; what was it caused by?

A. The development of the country generally, both in lumbering and farming.

Q. Where were you during that time in 1886?

A. In the city of St. Louis; located there.

Q. Did not the company have offices here in the State which would see the increase going on?

325 A. Exactly, sir; and from them we got the information that there would be an increase.

Q. During all that time, whenever there was a scarcity, didn't you favor Texas?

A. We had nothing to do with Texas.

Q. Did not the Iron Mountain road have connections with Texas roads?

A. It had connections, but no business furnishing cars to them.

Q. Didn't you furnish cars from St. Louis to the Texas line?

A. No, sir; excepting the through business

Q. I am talking about loaded cars.

A. Yes, sir.

Q. The through business for Texas was taken by way of Texarkana, was it not?

A. Not necessarily so.

Q. Didn't you, by way of favoring a long haul, furnish cars to carry the through freight?

A. It has been, since I have been car-service agent, the practice to use foreign cars for the long hauls.

Q. Where did the foreign cars come from?

326 A. From connecting lines.

Q. Borrowed by you?

A. Yes, sir; not the loaded cars.

Q. Had the railroad been borrowing cars to make up any deficiency you might have?

A. For any unexpected traffic to go over the line of the connecting road. We anticipated a very heavy increase in traffic in the fall of 1887, and it was really beyond expectations or anticipations.

Q. Don't you know there had been a deficiency in cars to transport the crops promptly and the lumber in 1884, 1885, and 1886.

A. I don't think 1884 or 1885 had any comparison with 1886 and 1887.

Q. Still there was a lack of cars?

A. There is no railroad in the world can afford to keep an equipment for a maximum traffic, and in the fall of the year there would possibly be an exceedingly heavy traffic, and we would have to make other arrangements for anticipating where the cotton

327 is going to and where the lumber is going to and to procure cars from their connecting lines.

Q. You mean when there is an extraordinary demand upon railroads that they are under no obligations to be in a condition to transport?

A. My view is that they should prepare themselves to handle it promptly, efficiently, and without delay.

Q. Didn't you state no railroad company could do that?

A. I stated that no railroad company could afford to maintain an equipment equal to the maximum trade for any unexpected trade.

Q. I understand what you say, but you say you borrowed 10,000 cars in 1887?

A. I said between certain months.

Q. What months?

A. Between September and December.

Q. Where did you borrow them?

A. From our immediate connections.

Q. Isn't it true that while there may be a great pressure here there would not be so much in other parts of the country, and they can hire cars for certain emergencies?

A. I don't know what you mean by hire them.

328 Q. Borrow them.

A. Yes, sir.

Q. Would you pay anything for them?

A. Pay mileage for the cars and give that road the benefit of the loaded haul.

Q. That is what people generally call hiring them. You paid something for them, didn't you?

A. There is a universal custom in the country that there is a mileage paid for every mile that a car makes over another road.

Q. Could not the cars have been hired in the United States for the purpose of transporting the crops in the fall of 1886 and 1887?

A. Not other than in the usual way. They could not have been hired at a rental per day.

Q. I am not talking about renting.

A. We could not have hired them.

Q. Could you have borrowed them?

A. Not unless we would guarantee to return them with a load, which gave them the traffic.

Q. You could have done it in that way, could you?

A. We did do it.

329 Q. Did you get a sufficient number of cars to transport the freight promptly piled up at the stations?

A. From my own personal knowledge I believe we did.

Q. You think you did?

A. Yes, sir.

Q. Why was the freight not transported promptly, then, if you had cars enough?

A. In 1886?

Q. Yes.

A. Well, I explained to you a little while ago the trouble in 1886.

Q. That was in the spring. I mean in the fall.

A. It took considerable time to recover, and in the fall of 1886 we made the contract for the anticipated increase of business in 1887.

Q. You say you had the cars in 1886; why wasn't the freight removed faster? You say you had cars enough?

A. No; I didn't say that.

Q. I understood you to say you had.

330 A. I didn't say that for 1886, because in the fall of 1886 we knew that we didn't have enough cars to handle the business and contracted for 4,155 more cars for 1887.

Q. Why didn't you borrow the cars for the purpose of moving the cotton in 1886?

A. If the cotton would go over Eastern lines or had a through rate or routing we could possibly have gotten the cars.

Q. What do you mean by a through routing?

A. I mean 5,000 or 6,000 bales of cotton, for instance down here at Pine Bluff, waiting loading for a routing to be got and for the proper line to name a rate over which it could go North or South.

Q. What would hinder you from borrowing cars for a short line as well as a long one?

A. There are no short lines to furnish cars to New York, not more than we could afford to let our own go.

Q. Are there no companies engaged in hiring cars to railroad companies?

331 A. None that I know of except trust companies.

Q. Well, the trust companies.

A. They sell the cars.

Q. Don't they hire them also?

A. It is impossible for me to say.

Q. Cars could have been bought of them, could they not?

A. Not in a sufficient number to take care of the next month's business. They might have been bought one year to handle the business of the next year.

Q. Was it on account of the deficiency in your cars in 1886 that you concluded it would be necessary to get more for 1887?

A. Yes, sir.

Q. Didn't you try to get just about a sufficient quantity to carry off the same quantity of freight that was carried off in 1886?

A. As I stated, we had made and did during the year, in the fall — the year, ask the millmen through our agents the expectations of their trade for the year, how much lumber they had on hand,
332 etc. We could not do that, of course, in the fall of 1886 for the cotton crop of 1887, but it was generally the practice to anticipate these things and find out what the crop of the country would be.

Q. Were *that* not a great many complaints in 1886 about the want of cars?

A. Yes; a great many.

Q. How many cars did you order to be constructed?

A. 4,155.

Q. What was the increase in mileage of the road in that year, 1886–1887?

A. None, sir; there might have been a few miles, some branches added, small lines, but no material increase.

Q. How many of those cars that you speak of came to Little Rock for receiving freight here?

A. I could not state positively. I could upon investigation.

Q. It was not enough, was it, at Little Rock?

A. You mean in 1886?

Q. I mean in 1887.

A. I believe there were more cars in Little Rock in 1887
333 than would have moved all the cotton that was here; plenty of cars to move every bale of cotton that was here.

Q. You don't know why it was not done?

A. No, sir.

Q. Were there enough cars here in 1886 to move all cotton and lumber at this place?

A. To move it in the ordinary course of business there were not in 1886.

Q. Wasn't there a continual complaint in 1885 and 1886 that cotton and lumber were allowed to accumulate along the road, to the great injury of the shippers?

A. There may have been some complaint in 1885, but not a very forcible one; but 1886 was very bad.

Q. 1887 was still worse, was it not?

A. The business of the lumbermen increased, to my own knowledge, 25 per cent. over 1886.

Q. How many bales of cotton can you carry in a freight car uncompressed?

A. From 18 to 20 or 22. I never have loaded cotton in
334 cars, but about that, I guess. It depends on the size of the car altogether.

Q. There were, then, plenty of cars in 1887 to move the cotton crop here?

A. I think that there were cars enough to have moved the cotton, provided it had been moved when it was offered.

Q. The Iron Mountain road is a part of the Missouri Pacific system?

A. It is operated—yes, sir—under the Missouri Pacific system.

Q. Are you the agent for the car service of the Iron Mountain or for the whole system?

A. For the whole system.

Q. Were these cars ordered for the Iron Mountain or for the whole system?

A. They were ordered for the system.

Q. That includes roads in Missouri, Arkansas, Texas, and Kansas?

A. Yes, sir.

Q. How many miles of road belong to that system?

A. About 5,012; 5,100 now.

Q. How many miles in Arkansas?

A. About 1,200.

335 Q. Was that about the condition of things in 1887 or not?

A. Yes, sir—no, sir; the mileage in 1887 was a little larger than it is now.

Q. How large in 1887 for the whole system?

A. A little over 6,000 miles, I think.

Q. What was the mileage in Arkansas at that time?

A. The same as it is now, with the exception of a few lines—little branches.

Q. These 4,155 cars were made for the entire Missouri Pac. system?

A. Yes, sir.

Q. How were they distributed?

A. As I said, there were about 3,327 of these cars that were moved to the Iron Mountain railroad for handling this business in 1887.

Q. Including the cars that you had made or part of those that were borrowed?

A. These are all new cars which I speak of now.

Q. They were sent here, but wer'n't they sent around and distributed everywhere?

A. A car that goes upon a railroad to be loaded, if it is
336 loaded for another point off of the line of that road of the same *guage*, it goes through unless objection is made by the receiving line.

Q. Cotton shipped in this State nearly all went out of the State, didn't it?

A. I think a very large part went to St. Louis.

Q. What was done with those cars when unloaded in St. Louis?

A. They were returned here to Arkansas.

Q. Were they not sent to other parts of the State?

A. In the fall of 1887 there was no necessity for that. I arbitrarily took them from the other parts of the State, something like 3,500 or 4,000, and had them moved to the Iron Mountain system.

Q. And the 10,000 borrowed cars?

A. Those 10,000 foreign cars were borrowed between the months of September and December, I mean.

Q. You borrowed them from foreign lines?

A. Entirely foreign lines.

Q. What foreign lines were they?

337 A. All our northeastern and northern connections and southeastern connections.

Q. You didn't borrow any from any lines except lines connected with you in business?

A. No, sir; we borrowed some from through-freight lines operated by different railroads.

Q. Isn't the custom with all roads when they have cars intended to rent out, as you call it, they will do so to anybody who is willing to pay the mileage?

A. I presume if a road had a large equipment they would be perfectly willing to let their car go through with the loading it contained, but I don't think the roads generally loan empty cars for the mileage; they are not built for that purpose.

Q. Then you frequently let other roads have cars for mileage?

A. No, sir; not with our consent, at no time. We might, upon the construction of new lines, furnish equipment where it was directly beneficial to the line; they might put themselves out

338 to loan cars upon a stated price per day, but not upon mileage. The traffic alone controls mileage and governs.

Judge CALDWELL:

Q. When you speak of cars for moving, do you have reference to moving it to the market only, or do you also include the moving from Little Rock to Argenta to be compressed?

A. I have reference particularly in moving the crop of the season. As far as my knowledge is concerned there was no intimation ever given to my office regarding the cars necessary or required to move cotton from Little Rock to Argenta. We had sufficient cars to move through the country the cotton offered.

Q. What is the distance from the point in Little Rock where the cotton is received to the compress in Argenta?

A. I could only state that generally by saying that I don't know what it is; never have been around there; not over 3 or 4 miles.

Q. Supposing it to be a mile or 2, how many cars would it

339 take to transport the cotton from Little Rock to Argenta as it would properly be delivered?

A. I don't think it would take over 10 or 12 cars a day, if the cotton was ready to move, unless—if you will allow me to explain, unless the warehouse was to receive the cotton and hold it at somebody's order or risk or order of consignment.

Judge CALDWELL:

Q. Suppose it was ready for delivery to the R'y Co. for transportation?

A. I don't think the business of Little Rock would require more than 15 or 20, and they could be moved over there, be unloaded promptly, and come back again. No demand was made particularly at that time to move cotton from Little Rock to Argenta. I see no reason why the cars could not have been furnished without trouble to move the cotton, as I understand the case now, from Main street to Argenta without trouble, provided the compress was ready to move the cotton and unload it.

Redirect examination:

340 Q. I was going to ask you if your answer to that question referred to the transportation of cotton alone to be transported between Little Rock and Argenta?

A. No, sir; that would be considered simply as switching.

Q. Have you had any experience—know anything about the business of compressing cotton?

A. Only in a general way. I have seen a compress at work and know how they do compress; know about, from general knowledge, how many bales of cotton could be loaded in a car.

Q. Do you know anything about the location and business of the Union Compress Company at Argenta?

A. No, sir; I never was there.

Q. Assuming that cotton was loaded on cars to be shipped to its destination by the various railroads that carry cotton from here, I want to ask you the question whether or not the movement of cotton from that point would be affected by the unexpected influx of cotton during that season?

341 A. Yes, sir; the same as the movement of cotton throughout the State would be, and I want to explain. So far as my personal knowledge goes, we have no knowledge of Main street as being a depot for the receiving of cotton other than the usual offices of the road.

Q. I understand the removal of cotton from the compress would be affected by this unexpected influx of cotton, assuming that cotton was shipped to its destination?

A. Yes, sir; if they had 1,000 bales to go over the Wabash they would try to get Wabash cars for it, and so on.

Q. How many cars were borrowed from foreign connections for service that fall?

A. Between 10,000 and 12,000 cars; could not give it exactly.

Q. How many cars were taken from other portions of the Missouri Pacific system and put into service in this State during that fall?

A. As an estimate, from 3,000 to 4,000 per month.

Q. How many of the 4,155 cars built under the order
342 made in 1886? How many cars were assigned to this road in this State?

A. About 3,300 cars. 3,327, I think, sent to the Iron Mountain.

Q. State whether or not these new cars and those taken from other portions of the road and cars borrowed—whether or not they were in addition to the regular car service that belonged to this line.

A. Yes, sir; that was in addition to what belonged to the Iron Mountain road.

Q. You were asked if you could not have hired cars from other lines. What do you state about your ability to procure cars on short notice?

A. The question, as I understood it, was whether there were any companies willing to hire cars to railroads?

Q. State what your facility for getting cars in a short time would have been in that way in 1886 and 1887.

A. You could not get them; it would be an impossibility; have to buy them and have the car works make them; it would
343 take time to get the lumber from Arkansas to the car works, iron, etc., and other material.

Q. What efforts, if any, were made to obtain cars to meet the emergency to carry on the cotton traffic in this State in 1887?

A. As I stated before, at my own instance I caused inquiries to be made.

Q. What I want to know is whether you exhausted all the efforts to meet this emergency in 1887?

A. Yes, sir; we did all possible to get cars to handle the traffic, and used means that were possibly not legitimate between railroads in order to help that much; in fact, stole cars.

Q. How do you mean stole cars?

A. Cars coming loaded, instead of returning them we sent them to Arkansas to take care of the cotton.

Q. Referring to the subject of the estimate you made in the fall of 1886 of the business of 1887, state what that estimate was based upon.

344 A. The information received from the agents at the different stations and the prominent people in the different counties, and from the lumbermen themselves as to the increased capacity of their mills, etc.

Q. What was the object of making that estimate?

A. In order to handle the business for the coming season.

Q. State what you did after the estimate was made.

A. I presented it to the general superintendent and general manager, and in November they contracted with the different car works for the new cars, 4,155.

Q. Was there anything unusual in the movement of cotton in this State and in the country generally in the fall of 1887?

A. The crop of 1887 was largely in excess of the crop of 1886, and much earlier.

Q. State in what manner it effected the efficiency of the means that you had adopted for moving the business of that fall.

345 State if it was affected in any way, and to what extent. You say you had increased facilities for moving the business of

this season upon the basis of the estimate made in the fall of 1886. State what effect, if any, the unusual market of the cotton crop of 1887 had.

A. We have always based, since my connection with the Iron Mountain road, our cotton season as commencing on the 1st of September; in the season of 1887 the cotton commenced moving very early in the preceding month, and we were very short of cars to handle that during August, but in September we got about the usual number of cars to handle the crop and kept it going.

Q. If it had come in in the usual time state what effect upon the arrangements you had made this would have had upon your ability to move the crop.

A. I think to move it as it came in according to the business before we would have found we had a little underestimated the
346 season compared with the crop of 1886. We have had no trouble since—very little trouble in 1888.

Q. Have you personal knowledge with regard to the movement of cotton in the fall of 1887 between the foot of Main street and the compress in Argenta?

A. I never heard of it until I was subpœnaed as a witness—know nothing about it whatever.

Q. Do you know nothing about what effect the early marketing of the cotton crop had upon the means necessary to move the cotton from Main street to Argenta?

A. Only from the general idea—seeing cotton come in.

Q. What I mean is this: Have you any personal knowledge of the effect that the early season had in the movement and facilities for moving cotton from the foot of Main street to the compress in Argenta?

A. No, sir; of my own personal knowledge I have none; never knew of any such place before.

Recross-examination:

347 Q. Speaking of borrowing cars and paying mileage—what is the customary rate per mile?

A. ⅛ of a cent per mile.

Q. That is with the expectation that the car is to come back loaded?

A. When we take the empty car we expect to give it back loaded, and when we take it from them loaded we give it back empty.

Q. Suppose you take it empty and return it empty, how much do you pay?

A. The same thing.

J. H. SHINN testified for defendant:

Q. What is your connection with the office of secretary of state?

A. I am clerk in that office.

Q. Was there kept in the office of the secretary of state a record of all insurance companies that ever delivered in that office a certificate of their principal place of business and designating an agent upon whom service may be obtained?

348 A. There is a place there for the filing of certificates for all foreign corporations and an index to the certificates filed.

Q. Can you state without looking through those files whether the Marine Insurance Company of London, Limited, has filed such a certificate or any paper designating an agent?

A. I looked through the certificates filed and through the index. The name of that company does not appear.

Q. State to the jury whether this company that I referred to has filed a certificate designating an agent upon whom service of summons and other process may be made and also designating the principal place of business of the company. Has that company filed that kind of a certificate or any certificate under the statute of the State of Arkansas?

A. No company of that name has filed such a certificate or any other certificate in our office.

349 The object is to show that plaintiff insurance company has not complied with the provisions of our statute, which was necessary to entitle it to do business in this State.

It was admitted by plaintiff that it had not filed any certificate or other paper in the office of the auditor of State for the reason the plaintiff was not doing business in the State of Arkansas.

Defendant then read in evidence, without objection, the articles of agreement and incorporation of the Union Compress Company of Little Rock, which reads as follows:

Articles of Agreement and Incorporation of the Union Compress Company.

Know all men by these presents that the corporators hereinafter named have this day and by these presents formed a cor-
350 poration under and in pursuance of the laws of the State of Arkansas in that behalf provided for "incorporations for manufacturing and other lawful business," and in evidence thereof do hereby execute the following articles of incorporation:

First. The name of said corporation shall be Union Compress Company.

Second. The corporators are W. H. Wright, Logan H. Roots, H. P. Johnson, M. G. Hall, Jno. G. Fletcher, R. E. Douglass, A. P. Howell, Sam. O. Smith, Geo. W. Martin, Jno. W. Deshon, and J. W. Miller.

Third. The place of business is to be located at Little Rock, Arkansas, and its office for transaction of business shall be in said city or at such other place as the board of directors may select.

Fourth. The general nature of the business proposed to be transacted by this corporation is the compression of cotton and operating a warehouse for the storage and sale of cotton and other general warehouse purposes.

351 Fifth. The amount of capital stock of the said corporation shall be one hundred thousand dollars, of which eighty thousand dollars has been subscribed by the corporators aforesaid,

and the residue thereof may be issued and disposed of as the board of directors may from time to time order and direct.

Sixth. The said capital stock shall be divided into four thousand shares of the value of $25 each.

Seventh. The affairs and business of the corporation shall be conducted and controlled by a board of directors consisting of six members, all of whom shall be stockholders of the corporation. Said board of directors shall elect one of its members president and one of its members as vice-president, and shall also elect a secretary and treasurer.

Eighth. The first election for directors shall be held immediately after the organization of the corporation, and said directors
352. shall serve for one year and until their successors are elected.

Ninth. The board of directors are empowered to ordain and establish all by-laws and regulations necessary to the management and business of said corporation, and alter and repeal the same at pleasure.

Tenth. The first meeting of the said corporators for organization shall be held in the city of Little Rock, at the office of Little Rock Oil and Compress Company, at 10 o'clock a. m. on the 6th day of June, 1887. The subscribers hereto hereby waive notice of said meeting.

In testimony whereof we have hereunto set our hands on this 4th day of June, 1887.

SAM. O. SMITH.
A. P. HOWELL.
M. G. HALL.
R. E. DOUGLASS.
GEO. W. MARTIN.
J. W. DESHON.
W. H. WRIGHT.
J. B. MILLER.
JOHN G. FLETCHER.
H. P. JOHNSON.
LOGAN H. ROOTS.

353 *Certificate.*

Whereas W. H. Wright, Logan H. Roots, H. P. Johnson, M. G. Hall, John G. Fletcher, R. E. Douglass, A. P. Howell, Sam. O. Smith, George W. Martin, John W. Deshon, J. B. Miller have associated themselves together as a body politic and corporate, to be known as Union Compress Company;

And whereas the said corporators, being the subscribers to the capital stock of the said corporation, have waived the fifteen days' notice as required by law and called a meeting for organization, to be held in the city of Little Rock, at the office of Little Rock Oil and Compress Company, at 10 o'clock a. m. on the 6th day of June, 1887.

Whereas, at the time and place above set out, a meeting of the subscribers aforesaid was held to organize said corporation and elect six directors; and

for the shed, and it is respectfully represented that an awning or shed at that point will be an improvement beneficial to the interests of the city, because the street in its present shape is dangerous to the public.

I, H. C. Jones, city clerk, do hereby certify that the above petition and instrument of writing is a true and correct copy and is now of record in my office, and that the said petition was granted on the 26th day of June, 1883, and mayor and clerk authorized to sign contract when drawn and prepared by the city attorney.

In testimony whereof I have hereunto set my hand, seal of my office, this the 6th day of July, 1883.

(Signed) W. C. JONES,
[SEAL.] *City Clerk.*

360 *Contract and Lease.*

This is to certify that the city of Little Rock, through the order of her city council made at a meeting thereof on the 26th day of June, 1883, has given and granted to the Little Rock Oil & Compress Company of said city license and permission to extend an open shed, with a gravel roof, across the foot of Main street, from their shed on the west side of said street to the brick cotton warehouse upon the opposite and east side of said street, such open shed to be used by said company for the purpose of trucking and storing cotton, for the period of ten years from said date, upon the following conditions, to wit:

1st. That if the needs of said city or public policy require the removal of said shed prior to the expiration of said ten years said company will, after fifteen days' notice of an order of the city council requiring such removal, without delay, remove said shed
361 free of any cost to said city.

2nd. That said company will at once and at their expense pave with brick and keep open for pedestrians to and from the skiff landing and boat-house the east sidewalk of said street alongside said warehouse and build and keep open and in proper condition the gutters of said sidewalk.

3rd. That said company will not interfere with the free passage of any part of said street to persons desirous of lawfully using the same for the ordinary purpose of travel for which the same may now be used, and that said company will hold said city harmless against all damage, expense, or cost of any kind that may result from such license and permission or be in any manner caused or occasioned by reason of the erection or extension of such shed or anything connected therewith, and that said company will
362 fully indemnify said city against any damage she may suffer or be made to pay and any loss that she may sustain by reason of such license and permission or the use or occupany of any portion of said street under such license or anything connected therewith or occasioned thereby, and that said company will not exercise or attempt to exercise any privilege in connection with or upon any portion of the ground covered by such shed other than

the purpose for which such license to occupy the same was granted as aforesaid, and that said company will not sublet any portion of said grounds or assign this license and permission without the written consent of said city duly given by order of her city council.

At the expiration of said term said company shall have the right to remove said shed if they so desire, provided the same be done within ten days after the expiration of said term; otherwise
363 the same shall be and become the property of said city.

In testimony whereof the said city of Little Rock, by order of her city council, has caused these presents to be executed by the mayor and attested by the city clerk of said city, with the seal of said city attached, and said company has caused these presents to be signed by its president and attested by its secretary, with its corporate seal affixed, this 5th day of July, 1883.

(Signed) FREDERICK KRAMER, *Mayor.*

Attest:

[SEAL.] H. C. JONES, *City Clerk.*

(Signed) LITTLE ROCK OIL AND COMPRESS COMPANY,
E. URQUHART, *President.*

Attest: W. H. WRIGHT,
Secretary & Treasurer Little Rock Oil and Compress Company.

I, H. C. Jones, city clerk of the city of Little Rock, Arkansas, do hereby certify that the foregoing is a true and correct copy of the instrument therein set forth as the same appears of record
364 in my office.

Witness my hand and the official seal of my office this the 6th day of July, 1883.

[SEAL.] H. C. JONES,
City Clerk.

To the introduction of said petition and lease in evidence plaintiff at the time and in the proper manner objected as incompetent and irrelevant, and the said objection was by the court sustained and the lease and petition excluded; to which ruling of the court the said defendant then and there excepted.

The defendant then offered to prove by W. H. Wright, president of the Union Compress Company, and others that the Union Compress Company held said lease by purchase, assignment, and transfer from the said Little Rock Oil and Compress Company, and that said Union Compress Company by virtue of said lease had held
365 said street and had placed said cotton within and upon the same, but said evidence was objected to by plaintiff as incompetent, and the court sustained the same; to which ruling of the court in sustaining said objection and excluding said evidence the defendant, by its counsel, then and there duly excepted.

The defendant then read in evidence without objection an ordinance of the city of Little Rock granting the Cairo & Fulton Rail-

road Company the right to construct, maintain, and operate its railway through the streets of the said city of Little Rock, Arkansas, said ordinance being dated November 30th, 1853, and also read in evidence the articles of consolidation, showing that the Cairo and Fulton railroad and the St. Louis & Iron Mountain Railway Company of Missouri were, on the 30th of April, 1884, duly and legally consolidated under the laws of Arkansas and Missouri, and as thus consolidated formed the St. Louis, Iron Mountain & Southern
366 Railway Company, the defendant herein, and that by reason of said consolidation the defendant company has succeeded to and held all the rights, privileges, and franchises and property of the said Cairo & Fulton Railroad Company under the laws of the State of Arkansas, including the tracks running through the streets of the city of Little Rock.

Defendant then introduced in evidence and read without objection an ordinance of the city of Little Rock, dated December 24th, 1879, duly passed, granting the Little Rock, Mississippi River and Texas Railway Company the right to construct, maintain, and operate the railroad through the limits of the city of Little Rock, from the depot of the said railroad "along and upon Water street and on the south bank of the Arkansas river" to the depot of the St. Louis, Iron Mountain & Southern Railway Company, the de-
367 fendant herein, in the western part of the city of Little Rock, and that the St. Louis, Iron Mountain & Southern Railway Company by purchase duly acquired all the property, rights, and franchises of said Little Rock, Mississippi River and Texas Railway Company long prior to the 14th — November, 1887.

This was all the evidence introduced on either side. The evidence being closed, the defendant requested the court to declare the law to be as follows:

1. The jury are instructed that if they find from the evidence that the defendant provided its engines with such appliances and devices as would ordinarily be effectual to prevent the escape of sparks from its engines, and that such appliances and devices were of the best-known and safest kind and were kept in proper order and repair and were carefully and prudently operated at and about the premises where the fire caught, this would exonerate
368 defendant from the charge of negligence in running its trains, unless some other negligence on its part is shown.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

2. If the Union Compress Company, who is not sued in this action, was the owner, holder, and in actual possession and control and management of the compress warehouse and its contents located at the foot of Main street, in the city of Little Rock, on November 14th, 1887, and if the defendant railway company had at that time no control or custody of and exercised no right of management or ownership over said warehouse or its contents, then the mere fact that it had a lot of cotton there for which it held receipts of said compress company would not make the defendant railway company liable for any damages growing out of the negligent

burning of said compress company's warehouses if caused
369 by negligence or want of ordinary care in the management of the same by the Union Compress Company and without any fault on part of defendant proximately contributory to said injury.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

3. In order to entitle plaintiffs to recover in this case the plaintiffs must prove by a preponderance of testimony that the fire which caused the injury in question was caused by or originated through some act or omission of the railway company or its servants or employees which proximately contributed thereto.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

4. The jury are instructed that it is a rule of evidence
370 that the plaintiff must make out his case by a preponderance or greater weight of testimony. In this case the plaintiff charges, among other things, that the fire which burned the cotton in question originated from sparks escaping from an engine on defendant's road. Before, therefore, it can recover on this ground it must establish this fact by a preponderance or greater weight of testimony.

The court refused to give said instructions, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

5. If the evidence on this point is evenly balanced or if there is a preponderance against the claim of plaintiff that the fire originated from sparks from a locomotive, your finding should be against the plaintiff on this ground.

The court refused to give said instruction, and defendant,
371 by its counsel, then and there duly excepted to said ruling of the court.

6. The defendant in this case is not required to prove in what manner the fire originated, or that it was not caused by sparks from its engines, but it is incumbent on the plaintiff, before he can recover on this ground, and the burden of proof is upon him, to prove that the fire originated from sparks escaping from one of the defendant railway company's engines.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

7. When the act or omission complained of as negligence is not in itself a distinct wrong to the party complaining, and can only become a wrong to any particular individual through injurious consequences resulting therefrom by or through the separate acts of others, there would be no liability upon the party originally committing the act or making the omission, unless it appears
372 from the evidence that the injurious consequences arising therefrom was the natural results, in the ordinary course of events, of such act or omission.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

8. If at the time said cotton was burned, on the 14th of Novem-

ber, 1887, at the foot of Main street, it was in the custody, possession, and control of the Union Compress Company and upon premises over which the defendant railway company had no control, and if it owed no duty as a common carrier in relation to said cotton, and if while in such custody and control the cotton was set on fire by the act of some unknown person, with whom the defendant had no connection and of whom it had no knowledge, then the defendant railway company cannot be held liable in this action.

The court refused to give said instruction, and defendant,
373 by its counsel, then and there duly excepted to said ruling of the court.

9. If at the time of the making of the contract an agreement between the defendant and the compress company for the transportation of cotton from the warehouse of the compress company at the foot of Main street to its compress in Argenta defendant had reasonable ground to believe that it would be enabled to transport such cotton as should be stored at the foot of Main street to the compress at Argenta with reasonable dispatch, and that such additional means of transportation were provided by the defendant as would have been sufficient during an ordinary season to have enabled it to move said cotton with reasonable dispatch, and if all reasonable efforts were employed by the defendant to remove the same within the usual and ordinary time and the delay was solely occasioned by the extraordinary and unusual influx of cot-
374 ton upon the lines of defendant and its connecting lines, so that it was thereby rendered impossible for the defendant, with proper diligence on its part, to procure cars to transport said cotton within a reasonable time, the defendant would not in that event be guilty of negligence or responsible for the delay in moving the cotton.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

10. The court instructs the jury that the plaintiff in this action has and holds no greater right to recover in this suit than he obtained by the right of subrogation from R. E. Douglass & Co. and the Howell Cotton Co. by reason of having paid the insurance for the cotton destroyed.

If, therefore, the jury find that the said R. E. Douglass & Co. and the A. P. Howell Co. were guilty in any manner of, creating
375 or assisting in creating the nuisance complained of, or in maintaining or assisting to maintain the same, or were in any respects a party to the maintenance of the same, then they were parties to the creation and maintenance of said nuisance and bars the plaintiff's right of action in this case; and if you so find, your verdict must be for the defendant.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

11. If the jury find from the evidence that R. E. Douglass & Co. and the Howell Cotton Co., to whose rights the plaintiffs are subrogated, were guilty of contributory negligence, either in the erection or the maintenance of the nuisance upon which this action is based,

or were a party to the same, then their contributory negligence is a complete defense to this action, and your verdict must be for
376 the defendant.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

12. If the insured, Howell Cotton Co. and R. E. Douglass & Co., deposited the cotton sued for in the warehouse at the foot of Main street prior to the time that it was ready for shipment, for the purpose of storing it at the sheds of the compress and warehouse company until they could succeed in accumulating sufficient quantities to enable them to ship it in graded lots, and if this was done against the rules of the compress company and over its objection and with knowledge of the blockade which existed at the warehouse and of the danger to which the cotton would be exposed, they were guilty of contributory negligence, and the plaintiff cannot recover in this action.

The court refused to give said instruction, and defendant,
377 by its counsel, then and there duly excepted to said ruling of the court.

13. If the jury believe from the evidence that the Union Compress Company allowed cotton to accumulate in its warehouse and neighborhood at the foot of Main street in such quantities as to constitute a nuisance without the assent or direction of the defendant company, and that the said compress company knew at the time that there would be delay on the part of the defendant in furnishing transportation to remove the same, and if you further believe that the defendant company had no management or control over said warehouse nor over the delivery to or receipt by said compress company of cotton at that point, then the defendant company cannot be chargeable with the creation or maintenance of a nuisance, if any such nuisance there was, and on this point you will find for the defendant.

The court refused to give said instruction, and defendant,
378 by its counsel, then and there duly excepted to said ruling of the court.

14. If the jury find from the evidence that there was no contract or arrangement between the railway company and the compress company which contemplated the depositing of cotton in and upon Main street, but that the placing of cotton there and the permitting of it to be placed there was the sole act of the compress company and the owners of the cotton, and that the railway company had no control over the premises where the cotton was stored, then the defendant is not liable in this suit, even though the depositing of cotton in and upon Main street constituted a public nuisance.

The court refused to give said instruction, and the defendant, by by its counsel, then and there duly objected to said ruling of the court.

15. In order to make the defendant liable for the placing
379 of cotton in and upon Main street the jury must find from the evidence that the defendant was a party to the arrange-

ment or agreement by which the cotton was deposited in and upon said street, and the mere fact that an arrangement existed by which the defendant issued bills of lading for cotton deposited in the compress warehouses and had agreed to handle the same from said warehouses to Argenta, this fact of itself will not make the defendant liable for an injury which would not have happened except for the placing of cotton on the street itself.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

16. If the jury believe from the evidence that on the 14th day of November, 1887, a large quantity of cotton was destroyed which was stored in the street at the foot of Main street without authority from the authorities of the city of Little Rock,
380 and that by reason of said nuisance the fire complained of was caused and created by which the damage claimed was suffered, nevertheless the jury cannot find the defendant railway company liable for the said injury unless they find that said defendant railway company either created said nuisance or authorized the same or was a party to the creation and maintenance of the same.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

17. If the jury find that the plaintiff at the time of the issuance of the policy of insurance introduced in evidence in this cause had not and has never up to this date filed in the office of the secretary of state a certificate designating an agent upon whom service
381 of summons and other process may be made, or a certificate stating the principal place of business of the plaintiff in this State, as required by the statute of the State, it cannot maintain this action.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

18. If the jury shall find that the plaintiff had not at the time the policy introduced in evidence in this cause was issued complied with the provisions of sections 3828 and 3829 of Mansfield's Digest of the Statutes of Arkansas, which sections read as follows:

"SECTION 3826. Every insurance company, including individuals, partnerships, joint-stock associations, and corporations, conducting any branch of an insurance business in this State, must trans-
382 mit to the auditor a statement of its condition and business for the year ending on the preceding 31st day of December, which statement shall be rendered on the 1st day of January following, or within sixty days thereafter, except that foreign companies shall transmit their statement of business other than that done in the United States, prior to the following 1st day of July, which statement must be in form and state the particulars required by the blanks prescribed by the auditor."

"SECTION 3829. Every company doing insurance business in this State shall file with the auditor at the same time with its annual statement a sworn statement of its net receipts in this State for the year ending on the 31st day of December, after deducting losses and

commissions from its gross receipts, and shall pay into the
383 State treasury, on or before the first day of March, a tax of two and one-half per centum on such net receipts, and such tax shall be in lieu of all other taxes, State, county, or municipal, on such receipts; nor shall any city, town, or municipality impose any license fee or privilege tax upon any company or the agent of any company for the privilege of transacting such business of insurance," it cannot recover in this action.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

The court thereupon, upon its own motion, charged the jury as follows:

1. "The complaint charges that the defendant and the Union Compress Company, by an agreement between themselves and by a general course of business, made the cotton sheds of the compress company at the foot of Main street a receiving station for
384 cotton to be sent from this city by any one to the compress of said Union Compress Company in Argenta for compression, and that defendant should transport all cotton thus received, and that the defendant failed to transport the cotton thus received promptly, but suffered it to accumulate at said cotton sheds and in Main street, a public highway of the city, until it became a public nuisance and was set on fire in Main street, and that by reason of said fire the cotton insured by it mentioned in the complaint was destroyed.

"The agreement mentioned in the complaint between the Union Compress Company and the defendant is admitted in the answer, and it is also admitted that the cotton did accumulate in said cotton sheds and at the foot of Main street and in said street, and that it was fired in said street; but the defendant alleges that it is
385 not responsible for the loss of the cotton mentioned in the complaint because, owing to an unexpected demand on it for cars for the transportation of freight in the months of September, October, and November, 1887, it could not furnish the means for transportation of the cotton received at the said cotton sheds promptly, according to its agreement.

"The court now instructs you that by said agreement it was the duty of the said defendant to transport the cotton thus received at said cotton sheds for shipment promptly to Argenta, & that if defendant failed to do so and by reason of the continued reception of cotton at said sheds and the continued giving of bills of lading therefor as often as demanded by shippers thereof, down to the day of the fire, cotton was suffered to accumulate at said sheds and on Main street until it endangered the property of others in the immediate vicinity and that mentioned in the complaint, then said
386 defendant was guilty of aiding in the creation and maintenance of a public nuisance and is liable for the loss mentioned in the complaint, and its defense that it was hindered from transporting said cotton from the foot of Main street by reason of an unexpected pressure of business is not sustained by the evidence.

2. "The defendant has pleaded further that it is not liable for the

injury complained of in this case because Douglass & Co. and Howell Cotton Company by their own negligence contributed to said loss of said cotton; but the court instructs you that there is no evidence to sustain this defense.

3. "If the jury find that the defendant was guilty of aiding in creating, maintaining, or continuing said nuisance as aforesaid, and that the cotton mentioned in said complaint was destroyed by reason thereof, and the jury find that at the time of its loss it was
387 insured against fire by the plaintiffs, and that plaintiffs have since that time and before the bringing of this suit paid the amount of said loss to the insurer, that being the full value of the cotton, the jury will find for the plaintiff and will assess their damages at the sums thus paid by them, with interest, at the rate of six per centum per annum, from the date of such payment until the present time.

"The defendant has pleaded that the policies of insurance mentioned in the complaint were void because the plaintiffs had not complied with the laws of this State. Upon the evidence this defense is not sustained, and on that issue the jury will find for the plaintiff."

To paragraph 1 of said charge the defendant then and there, by its counsel, duly excepted, and it especially excepted to that part of said paragraph of said charge which reads as follows:
388 "The agreement mentioned in the complaint, between the Union Compress Company and the defendant, is admitted in the answer," and especially to the further part of said charge which reads as follows:

"The court now instructs you that by said agreement it was the duty of the said defendant to transport the cotton thus received at said cotton sheds for shipment promptly to Argenta, and that if defendant failed to do so, and by reason of the continued reception of cotton at said sheds and the continued giving of bills of lading therefor as often as demanded by shippers thereof, down to the day of the fire, cotton was suffered to accumulate at said sheds and on Main street until it endangered the property of others in the immediate vicinity and that mentioned in the complaint, then said defendant was guilty of aiding in the creation and main-
389 tenance of a public nuisance and is liable for the loss mentioned in the complaint, and its defense that it was hindered from transporting said cotton from the foot of Main street by reason of the unexpected pressure of business is not sustained by the evidence;" but the court overruled defendant's objections, in proper time and proper manner duly made, and gave said charge; to which rulings of the court defendant, by its counsel, then and there duly excepted, and now tenders its bill of exceptions.

And to the 2d paragraph of said charge the defendant, by its counsel, then and there duly excepted and now tenders its bill of exceptions.

And to the 3d paragraph of said charge the defendant, at the proper time and in the proper manner, duly excepted and likewise tenders its bill of exceptions.

390 The jury returned a verdict in favor of the plaintiff for the sum of thirteen thousand four hundred and seventy-five dollars and ninety-three cents (13,475.93); whereupon said defendant comes and prays the court that this bill of exceptions may be signed, sealed, and made a part of their record roll in said case named in the caption, which, upon examination, is found correct and accordingly done.

HENRY C. CALDWELL, *Judge.*

Filed March 8, 1890.

RALPH L. GOODRICH, *Clerk.*

Which citation is as follows:

391 The United States of America to the Marine Insurance Company of London, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division, eastern district of Arkansas, wherein The St. Louis, Iron Mountain & Southern Railway Company — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment as rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

The Seal of the District Court, Western Division of East. Dist. Ark., U.S.A.

Witness the Honorable Henry C. Caldwell, district judge of the district court, this 8th day of March, A. D. 1890.

HENRY C. CALDWELL,
District Judge.

We acknowledge service of the above citation.
M'ch 8, 1890.

U. M. ROSE,
G. B. ROSE,
For Defendant in Error.

392 In the Supreme Court of the United States.

MARINE INSURANCE COMPANY
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.

The plaintiff in error makes the following assignment of errors in the above-entitled cause:

1st. The court erred in overruling defendant's plea of non-joinder filed herein.

2nd. The court erred in overruling the demurrer filed by defendant to each of the paragraphs of plaintiff's complaint herein.

3rd. The court erred in permitting, over defendant's objection,

the testimony of H. G. Van Etten, C. E. Ferguson, J. W. Coy, and J. H. Trump to go to the jury, wherein it was attempted to show that there had been a shortage of cars on defendant's road during the years 1886 and 1887 prior to the fire, and that conse-
393 quently caused delay in the shipment of lumber over defendant's road when offered by the lumber mills in the State of Arkansas during those years.

4th. The court erred in permitting plaintiffs, over defendant's objection, to read to the jury the ordinance of the city of Little Rock, No. — of section 596, forbidding all persons from encumbering or obstructing any street, alley, or public place in the city of Little Rock.

5th. The court erred in permitting plaintiffs, over defendant's objection, to read to the jury the proclamation of the mayor of the city of Little Rock ordering all persons within the corporate limits to remove all bales of cotton from the streets and alleys in said city and from storing their cotton or property therein.

6th. The court erred in refusing to permit the defendant to read in evidence a written petition from the Little Rock Oil and Compress Company to the city of Little Rock, Ark., and a lease
394 executed by the city of Little Rock to the Little Rock Oil and Compress Company and by said company assigned and transferred to the Union Compress Company, wherein the said city leased for a term of years all that part of North Main street, lying between its warehouses, near and adjacent to the defendant's railway tracks.

7th. The court erred in refusing to permit defendant to prove that at the time of the fire the Union Compress Company held, occupied, and used North Main street under and by authority of a written lease made and executed to it and its assignors in writing by the city council of the city of Little Rock.

8th. The court erred in refusing to give the first instruction asked for by the defendant.

9th. The court erred in refusing to give the second instruction asked for by the defendant.

10th. The court erred in refusing to give the third instruction asked for by the defendant.

11th. The court erred in refusing to give the fourth instruction asked for by the defendant.

395 12th. The court erred in refusing to give the fifth instruction asked for by the defendant.

13th. The court erred in refusing to give the sixth instruction asked for by the defendant.

14th. The court erred in refusing to give the seventh instruction asked for by the defendant.

15th. The court erred in refusing to give the eighth instruction asked for by the defendant.

16th. The court erred in refusing to give the ninth instruction asked for by the defendant.

17th. The court erred in refusing to give the tenth instruction asked for by the defendant.

18th. The court erred in refusing to give the eleventh instruction asked for by the defendant.

19th. The court erred in refusing to give the twelfth instruction asked for by the defendant.

20th. The court erred in refusing to give the thirteenth instruction asked for by the defendant.

21st. The court erred in refusing to give the fourteenth in-
396 struction asked for by the defendant.

22nd. The court erred in refusing to give the fifteenth instruction asked for by the defendant.

23rd. The court erred in refusing to give the sixteenth instruction asked for by the defendant.

24th. The court erred in refusing to give the seventeenth instruction asked for by the defendant.

25th. The court erred in refusing to give the eighteenth instruction asked for by the defendant.

26th. The court erred in giving its charge to the jury as set out in paragraph numbered (1) of said charge, and especially in giving that portion of the charge specifically set out in the bill of exceptions on page 368 of the record.

27th. The court erred in giving in its charge to the jury the second paragraph of said charge, which is specifically set out in the bill of exceptions.

28th. The court erred in giving to the jury the third paragraph of its charge as set out specifically in the bill of exceptions,
397 and to which exceptions were properly taken at the time and duly allowed.

29th. The court erred in taking the case from the jury and finding the facts therein, thus virtually rendering a verdict without the aid of a jury.

Wherefore defendant prays that the judgment rendered in this cause may be reversed, set aside, and held for naught.

DODGE & JOHNSON,
For Pl'ff in Error.

Endorsed: Filed March 8th, 1890. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

398 And on March 24, 1890, as follows:

Comes the defendant, by Dodge & Johnson, Esqrs., its attorneys, and files herein its supersedeas bond, which is approved by the court and ordered to operate as a supersedeas in this cause.

Which bond is as follows:

In the United States Circuit Court for the Eastern District of Arkansas.

MARINE INSURANCE COMPANY
vs.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Bond.

Know all men by these presents that we, The St. Louis, Iron Mountain and Southern Railway Company and Zeb. Ward and H. M. Cooper, are held and firmly bound unto the Marine Insurance
399 Company in the full and just sum of twenty-five thousand dollars (25,000), to be paid to the said Marine Insurance Company, its certain attorneys, successors, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of March, A. D. 1890.

Whereas lately, in the eastern district of Arkansas, at Little Rock, in the United States circuit court for said district, in a suit depending in said court between the Marine Insurance Company and the St. Louis, Iron Mountain and Southern Railway Company, judgment was rendered against the said St. Louis, Iron Mountain and Southern Railway Company, and the said St. Louis, Iron Mountain and Southern Railway Company having obtained an appeal or writ of error and filed a copy thereof in the clerk's office of
400 the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Marine Insurance Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of the October term next: Now, the condition of the above obligation is such that if the said St. Louis, Iron Mountain and Southern Railway Company shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation will be void; else to remain in full force and virtue.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
By DODGE & JOHNSON,
Att'ys of Record. [SEAL.]
ZEB. WARD. [SEAL.]
HENRY M. COOPER. [SEAL.]

Witness:
GEO. E. DODGE.

401 We consent that this bond may be approved.
M'ch 24, 1890.

U. M. ROSE.

The within and foregoing bond taken and approved and to operate as a supersedeas bond this 24th day of March, A. D. 1890.

HENRY C. CALDWELL,
U. S. Circuit Judge, 8th Circuit.

Filed March 24, 1890.

RALPH L. GOODRICH, *Clerk.*

402 UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas. }

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office and constitute a true copy of the record and of the assignment of errors and of all proceedings in the case of Marine Insurance Company of London *vs.* St. Louis, Iron Mountain and Southern railway.

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

In witness whereof I have hereunto set my hand and the seal of said court this 28th day of May, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

Attest:

RALPH L. GOODRICH, *Clerk.*

Endorsed on cover: Case No. 14,047. E. Arkansas C. C. U. S. No. 112. The St. Louis, Iron Mountain & Southern Railway Complaintiff in error, *vs.* The Marine Insurance Company of London. Filed June 4, 1890.

UNITED STATES OF AMERICA,
CIRCUIT COURT OF THE UNITED STATES,
Eastern District of Louisiana,
New Orleans Division.

A. Shwartz & Sons, Intervenors, Plaintiffs in Error,
versus
The H. B. Claflin Company, Defendant in Error.
H. Kern & Son, Defendants.
} No. 12,059.

Messrs. W. S. Benedict, Howe & Prentiss and Rouse & Grant, for A. Shwartz & Sons, Intervenors, Plaintiffs in Error.

Messrs. B. Titche and Percy Roberts, for H. Kern & Son et al., Plaintiffs in Error.

Messrs. Lazarus, Moore & Lemle, for The H. B. Claflin Company, Defendant in Error.

Writs of Error to the Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division, from the Circuit Court of Appeals of the United States, for the Fifth Circuit, returnable within Thirty (30) Days from the Second (2nd) day of May, A. D. 1893.

H. Kern & Son, Plaintiffs in Error,
versus
The H. B. Claflin Company, Plaintiffs.
A. Shwartz & Sons, Intervenors, Defendants in Error.
} No. 12,059.

Messrs. Percy Roberts and Bernard Titche, for H. Kern & Son, Plaintiffs in Error.

Messrs. Lazarus, Moore & Lemle, for the H. B. Claflin Company.

Messrs. W. S. Benedict, Howe & Prentiss and Rouse & Grant, for A. Shwartz & Sons, Defendants in Error.

Writ of Error to the Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division, from the Circuit Court of Appeals of the United States, for the Fifth Circuit, returnable within Thirty (30) Days from the 26th day of May, A. D. 1893, at the City of New Orleans, La.

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Petition etc., etc., for Attachment and Garnishment. Filed Feb. 22nd, 1892.

The H. B. Claflin Co. } No. 12,059.
vs.
H. Kern & Son.

To the Honorable the Judges of the United States Circuit Court for the Fifth Circuit and Eastern District of Louisiana:

The petition of The H. B. Claflin Co., a corporation created under the laws of the State of New Jersey, and a citizen of the State of New Jersey, doing business in the City of New York, State of New York,

With respect represents:

That the commercial firm of H. Kern & Son, composed of Henry Kern and Emile Kern, citizens of the State of Louisiana, and domiciled and doing business in the City of New Orleans, is justly and truly indebted unto your petitioners in the full sum of Twenty-one Thousand Seven Hundred and Twenty-eight ($21,728.00) Dollars, for this, to-wit:

That your petitioners are holders of a series of notes drawn by said H. Kern & Son on the dates hereinafter stated, and maturing at various dates as herein described.

One note dated November 27th, 1891, due January 29th, 1892, for Twenty-six Hundred and Forty-six ($2,646.00) Dollars. That said note is subject to a credit of One Thousand ($1,000.00) Dollars.

One Note dated December 14th, 1891, payable sixty days after date, due February 19th, 1892, for Twenty-six Hundred and Forty-seven ($2,647.00) Dollars, which note is subject to a credit of One Thousand ($1,000.00) Dollars.

One note dated December 28th, 1891, sixty days after date for the sum of Twenty-Six Hundred and Forty-Seven & 98-100 ($2,647.98) Dollars.

One Note dated September 10th, 1891, payable six months after date, and maturing March 13th, 1892, for Twenty-Three Hundred and Fifty & 69-100 ($2,350.69) Dollars.

One Note dated December 16th, 1891, payable ninety days after date, and maturing March 18th, 1892, for Eleven Hundred and Forty-one & 22-100 ($1141.22) Dollars.

One Note dated January 3rd, 1892, payable three months after date, and maturing April 6th, 1892, for Eight Hundred and Eleven & 06-100 ($811.06) Dollars.

One Note dated January 11th, 1892, payable four months after date and due May 14th, 1892, for Seventeen Hundred and Eighty-Three & 36-100 ($1783.36) Dollars.

One Note dated November 20th, 1891, payable eight months after date and maturing July 23rd, 1892, for Eleven Hundred and One & 23-100 ($1101.23) Dollars.

One Note dated January 5th, 1892, payable seven months after date maturing August 9th, 1892, for Seven Hundred and Sixty-Four & 70-100 ($764.70) Dollars.

One Note dated September 10th, 1891, payable twelve months after date, maturing September 13th, 1892, for Twenty-Three Hundred and Fifty & 69-100 ($2350.69) Dollars.

One Note dated January 21st, 1892, payable eight months after date, due December 24th, 1892, for Sixteen Hundred and Twenty-two & 39-100 ($1622.39) Dollars.

One note dated September 10th, 1891, payable eighteen months after date, due March 13th, 1893, for Twenty-three Hundred and Fifty and 69-100 ($2350.69) Dollars.

Making the aggregate of said notes Twenty-two Thousand Two Hundred and Seventeen & 01-100 ($22,217.01) Dollars, subject to a credit of Two Thousand ($2000.00) Dollars, leaving due, and to become due to your petitioner upon said notes, the sum of Twenty Thousand Two Hundred and Seventeen & 01-100 ($20,217.01) Dollars, with interest thereon, as stipulated in said notes.

Petitioners further represent: That said H. Kern & Son are further indebted to them in the sum of Fifteen Hundred and Ten & 99-100 ($1510.99) Dollars, part of which is due, and part to become due under the terms of sale, said indebtedness being for merchandise sold and delivered by your petitioners to said H. Kern & Son for prices agreed upon at the time of said sale.

That the entire indebtedness of said H. Kern & Son to your petitioners, as evidenced by their notes, and for merchandise sold and delivered as aforesaid, due and to become due as aforesaid, aggregates the sum of Twenty-one Thousand Seven Hundred and Twenty-eight ($21,728.00) Dollars.

Petitioners represent: That said H. Kern & Son have defaulted in the prompt payment of their obligations to your petitioners, and are now negotiating a sale of their entire stock of merchandise and of the business heretofore conducted by them in the city of New Orleans; that they have converted, and are about to convert, their property into money or evidences of debt, with intent to place the same beyond the reach of their creditors; and that they are about to mortgage, assign or dispose of their property, rights or credits, or some part thereof, with intent to give an unfair preference to some of their creditors; all to the great damage and injury of your petitioners; and that a writ of attachment is necessary in the premises to protect petitioners' rights.

Petitioners further represent: That the sale by said H. Kern & Son of their entire stock of merchandise, is about to take place between said H. Kern & Son and the firm of A. Schwartz & Sons, and that A. Schwartz & Sons should be made garnishees herein under the writ of attachment issued in this cause.

Wherefore, The premises, annexed affidavit and bond considered, your petitioners pray that a Writ of attachment issue herein, directed to the Marshal of this Hon. Court, commanding him to seize, attach and take into his possession the property, rights and credits of the firm of H. Kern & Son, and to hold the same until the further order of this Hon. Court. That garnishment process issue herein directed to A. Schwartz & Sons, commanding them to appear and answer under oath and in writing, within the legal delays, the accompanying interrogatories hereto annexed; that H. Kern & Son be duly cited to appear and answer the demand of your petitioners, and that after due and legal proceedings had, that there be judgment in favor of your petitioners, and against said H. Kern & Son, and the individual members of said firm, *in solido*, for the sum of Twenty-one Thousand Seven Hundred and Twenty-eight ($21,728.00) Dollars, payable at the maturity of said obligations, as evidenced by said notes, with interest thereon as stipulated in the notes; and upon the open account at five (5%) per cent. per annum from the maturity of said account. And that the Writ of Attachment issued herein be main-

tained, and petitioners' privilege upon the property attached and garnisheed be recognized, and that petitioners be paid out of the proceeds of the property attached and garnisheed by preference and priority.

Petitioners pray for costs and for all general relief.

HENRY L. LAZARUS,
Attorney for the H. B. Claflin Co.

Affidavit.

Henry L. Lazarus, being duly sworn, deposes and says: That the H. B. Claflin Co., plaintiffs herein, are citizens of the State of New Jersey, and that it is absent from the State of Louisiana, and neither the President, nor any of the executive officers of said corporation, are within the State of Louisiana, and that affiant is the Attorney-at-law and in fact of this corporation in this proceeding.

That there is now past due of the indebtedness herein sued upon the sum of Thirty-two Hundred and Ninety-three ($3293.00) Dollars, and that the balance of said indebtedness will become due at the times, and for the amounts, stated in the petition herein, and that all the facts and allegations contained in the foregoing petition are true, and that a writ of attachment is necessary in the premises to protect the rights of petitioners herein.

HENRY L. LAZARUS.

Sworn to and subscribed before me this 22nd day of February, A. D. 1892.

HUNTER C. LEAKE, *Notary Public.*

Interrogatories

To be propounded to A. Schwartz & Sons and to Nathan I. Schwartz, a member of said firm:

1st. It is not true that you were, prior to the issuance of the writ in this case, to-wit: February 22nd, 1892, negotiating with H. Kern & Son to purchase their entire stock of merchandise contained in their store at the Cor. of Canal & Dauphine Streets in the city of New Orleans; and were you not in furtherance of said negotiation listing their property by taking stock thereof, either directly or through your servants and employees; and is it not true that you

were negotiating at the time stated with the firm of H. Kern & Son to take possession of the building heretofore occupied by them for the purpose of re-establishing yourselves in business?

2nd. Is it not true that the purchase price for said stock of merchandise, if consummated, was to be paid in cash, or in negotiable securities? State what the agreement and terms were between H. Kern & Son and yourselves with reference to the purchase of said stock of merchandise and the right of occupancy of the building heretofore occupied by H. Kern & Son.

3rd. Had you in your hands, or under your control, directly or indirectly, at the time of service of these interrogatories, or at any time since, any money, rights, credits, or other property whatsoever, belonging or due to the said defendants in writ, or in which they have or had any interest for the whole or for a part, and if yea, what is the nature, description and amount thereof; and is the same sufficient to pay the full amount of said writ, or if less, to what amount? You being asked and required to make a full disclosure in relation to the same.

4th. Were you not at the time of service of these interrogatories upon you, or since, directly or indirectly indebted or obligated unto the said defendants in writ for anything, or for any sum whatever, whether for yourself alone, or together with others, in consequence of any sale or exchange of transaction of any kind whatever, whether the same be due or to become due, and whether the interests of said defendants in writ be direct or indirect, or be for the whole or a part only, or whether it be by bill, note or otherwise; and if yes, what is the nature, description and amount thereof, and is the same sufficient to pay and satisfy the full amount of said writ and costs; or if less, what amount? You being asked and required to make a full and detailed disclosure in relation to the same.

5th. Have you, at any since the service of notice of seizure in your hands herein made, directly or indirectly, unto or with the said defendants in writ any payment or novation or compromise, or arrangement, or given them any note or written obligation, or received from them directly or indirectly any receipt or acquittance? and if yes,

state the nature and description and amount thereof, and the time, place and circumstances of the same.

HENRY L. LAZARUS,
Attorney for the H. B. Claflin Co.

New Orleans, February 22nd, 1892.

Order.

Let the writ of attachment issue herein as prayed for and according to law, upon petitioners giving bond with good and solvent security in the sum of Twenty-Two Thousand Dollars conditioned as the law directs; and let A. Schwartz & Sons and Nathan I. Schwartz be made garnishees herein and ordered to answer the accompanying interrogatories under oath and in writing within the delay required by law.

EDWARD C. BILLINGS, *Judge.*

February 22nd, 1892.

Bond for Attachment.

The H. B. Claflin Co.
vs.
H. Kern & Son.
} No. 12,059.

Bonds for Writs of Attachment and Sequestration.

Know all men by these Presents, That we, the H. B. Claflin Co., as principal, and Henry Beer, as surety, of the City of New Orleans and State of Louisiana, are held and firmly bound unto E. R. Hunt, Clerk of the Circuit Court of the U. S., 5th Circuit and Eastern District, and his successors in said office, in the sum of Twenty-Two Thousand and ——— Dollars, lawful money of the United States of America, for which payment, well and truly to be made to the said Clerk or his successors, we bind ourselves *in solido*, and each of our executors, administrators, heirs, and assigns, firmly by these presents.

Sealed with our seals, and dated the twenty-second day of February, 1892.

Whereas, the said H. B. Claflin Company have this day presented a petition to the Circuit Court of the U. S. for Eastern District, 5th Circuit, praying for a writ of Attachment to issue against H. Kern & Son.

Now, the condition of the above obligation is, that we, the above bound principal and surety, will well and truly

pay to the said clerk, or his successors in office, for the benefit of any and all persons interested in said suit, all such damages as may be recovered against us, in case it should be decided that the said writ was wrongfully obtained.

THE H. B. CLAFLIN CO.,
by HENRY L. LAZARUS, *their atty.*
HENRY BIER.

Signed, sealed and delivered in presence of:
HUNTER C. LEAKE.

Writ of Attachment.

The H. B. Claflin Co. *vs.* H. Kern & Son. } No. 12,059.

The President of the United States,

To the Marshal of the United States for the Eastern District of Louisiana,—Greeting:

You are hereby commanded to attach and take into your possession, according to law, the property, rights and credits of the defendant, H. Kern & Son, that may be found within our said District, to satisfy the claim of the plaintiff, amounting to the sum of Twenty-one Thousand Seven Hundred and Twenty-eight Dollars, with interest as prayed for, and costs, and to hold the same to satisfy the Judgment of the Court in the premises.

And of your acts and doings herein that you make due return, according to law. Hereof fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of February, 1892.

E. R. HUNT, *Clerk*,
by H. J. CARTER, *Dy. Clerk.*

Marshal's Return.

Writ of Attachment:

Received by U. S. Marshal, Feb. 22nd, 1892, on the same day I seized and took into my possession all the goods, notions, etc., found in the dry goods store of H. Kern & Son in the City of New Orleans, La., Corner of Canal and Dauphine Sts., and appointed J. R. Pennigre

and J. W. Hunter, keepers, and served written notice of said seizure on H. Kern & Son by handing same to Henry Kern in person, on Feb. 22 | 92, and on the 23rd day of same month the Intervenors herein, A. Schwartz & Sons, having executed their Release bond in favor of Plaintiffs herein for the sum of $22,000.00, I released said seizure; subsequently, to-wit: on Feb. 25th, 1892, Plaintiffs herein excepted to the form and amount of the bond, filed and filed motion asking that Intervenors file a bond in this case as required by law; motion made absolute on Feb. 29th, 1892, and on March 1st, 1892, the Intervenors filed release bond in the sum of $35,000.00, with Gustave Lehman as security—notice of the filing of which I gave Plaintiff in writing on March 2nd, 1892, and I endorsed and transferred said bond to plaintiffs on the day of its execution.

J. B. DONNALLY,
U. S. Marshal.
by T. J. GALBREATH,
Dy. U. S. Marshal.

Copy of Petition, Interrogatories and Citation to be served on A. Schwartz & Sons. Filed Feb. 24th, 1892.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

The President of the United States of America,
To A. Schwartz & Sons, Garnishees:

You are hereby Cited to declare on oath, what property or effects belonging to the Defendants in this case you have in your possession or under your control, or in what sum you are indebted to said Defendants, and also, to answer in writing, under oath, the interrogatories annexed to the Petition, of which a copy accompanies this Citation, and deliver your answer to the same in the office of the Clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, in the city of New Orleans, within ten days after the service hereof, otherwise judgment will be entered against you for the amount claimed by the Plaintiff, with interest and costs.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of New Orleans, this 22nd day of February, A. D. one thousand eight hundred and ninety-two, and of the Independence of the United States of America the 116 year. E. R. HUNT, *Clerk.*

by H. J. CARTER, *Dy Clerk.*

Received by U. S. Marshal, Feb. 22 | 92, and on the same day I served a copy of the within citation on accompanying and copy of interrogatories on A. Schwartz & Sons, by handing the same to Nathan J. Schwartz, a member of the firm of A. Schwartz & Sons in person at his office, Cor. Dauphine and Canal Streets, in the city of New Orleans, La., and leaving the same in his hands.

J. B. DONNALLY, *U. S. Marshal.*

by J. E. BOEHLER, *Dy U. S. Marshal.*

Copy of Petition, Interrogatories and Citation to be served on Nathan I. Schwartz, Garnishee. Filed Feb. 25th, 1892.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

The President of the United States of America,
To Nathan I. Schwartz, Garnishee.

You are Hereby Cited to declare on oath, what property or effects belonging to the Defendants in this case you have in your possession or under your control, or in what sum you are indebted to said Defendants, and also, to answer in writing under oath, the interrogatories annexed to the Petition, of which a copy accompanies this Citation, and deliver your answer to the same in the office of the Clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, in the City of New Orleans, within ten days after the service hereof, otherwise judgment will be entered against you for the amount claimed by the Plaintiff, with interest and costs.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of New Orleans,

this 22nd day of February, A. D. one thousand eight hundred and ninety-two, and of the Independence of the United States of America the 116 year.

E. R. HUNT, *Clerk*,
by H. J. CARTER, *Dy. Clerk*.

Received by U. S. Marshal, Feb. 22 | 92, and on the same day I served a true copy of the within Citation on accompanying petition and copy of Interrogatories on Nathan I. Schwartz, by handing the same to him in person at his office, Cor. Canal and Dauphine Sts., in the City of New Orleans, La., and leaving the same in his hands.

J. B. DONNALLY, *U. S. Marshall.*
By J. E. BOEHLER, *Dy. U. S. Marshal.*

Copy of Petition and Citation. Filed Feb. 23rd, 1892.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

The President of the United States of America, Greeting:

To H. Kern & Son, New Orleans, La.:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this Citation, or to deliver your answer to the same in the office of the Clerk of the Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, in the City of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the Court is held.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of New Orleans, this 23rd day of February, A. D. one thousand eight hundred and ninety-two and Independence of the United States of America the 116th year.

E. R. HUNT, *Clerk.*

Marshal's Return.

Received by U. S. Marshal, Feb. 23 | 92, and on the same

day I served a true copy of the within citation and accompanying petition and Interrogatories on H. Kern & Son, by handing the same to H. Kern in person, at his store, cor. Dauphine and Canal Sts., in the city of New Orleans and leaving the same in his hands.

J. B. DONNALLY, *U. S. Marshal.*
By J. E. BOEHLER, *Dy U. S. Marshal.*

Answer of Garnishees. Filed Feb. 23rd, 1892.

The H. B. Claflin Co.
vs. } No. 12,059.
H. Kern & Son.

Now comes into court, A. Schwartz & Sons, of this City, a firm composed of Abram Schwartz, Leon L. Schwartz, Nathan I. Schwartz and Simon J. Schwartz, as garnishees herein, and for answer to the interrogatories herein propounded say:

First. To the First Interrogatory, yes; and further answering say, That we had over two hundred and fifty (250) employes under part pay, skilful and trustful, and desired to avail ourselves of our means to re-establish a business on Canal street in accord with the previous business conducted by us before our store was entirely consumed by fire.

Second. To the second interrogatory respondents answer: Yes, it is true, the purchase price was to be paid for the stock of H. Kern & Son in cash, provided they obtained from Court proper authority so to do, but the price was nevertheless paid, trusting upon the reliability of said firm of H. Kern & Son, the price was paid. With reference to the right of occupancy, there appeared to be an indebtedness to the owner of the building, and he was consulted in regard thereto, as to transfer of lease thereof, which was agreed to by him to be given your garnishees, with right reserved in him from cash payment of price to receive the amount of the rental overdue for Six thousand ($6,000.00) dollars, together with such costs or interest as might be due thereon.

Third. To the third interrogatory garnishees answer: No; that they were in physical possession of what had been the property of defendant prior to the service of writ,

and service of process herein, and that no part or parts thereof were in their hands to benefit plaintiff, but they may say, that from the amount of their purchase price, as stated in answer to Interrogatory One, the plaintiff is entitled to be credited, and receive either the full amount due him, or such pro rata as may be found due him, of which your garnishees know naught.

Fourth. To the Fourth Interrogatory your garnishees answer: No.

Fifth. To the Fifth Interrogatory your garnishees answer: No.

W. S. BENEDICT, *Atty.*

Nathan I. Schwartz, being duly sworn, deposes and says, that he is a member of the firm of A. Schwartz & Sons, and that the foregoing answers are true and correct.

N. I. SCHWARTZ.

Sworn to and subscribed before me this 23rd day of February, 1892.

F. J. DREYFOUS, *Not. Pub.*

Petition of Intervention of A. Schwartz & Sons. Filed Feb. 23rd, '92.

The H. B. Claflin Co., *vs.* H. Kern & Son. } No. 12,059.

The petition of intervention of A. Schwartz & Sons, of this city, a firm composed of Abram Schwartz, Leon L. Schwartz, Nathan I. Schwartz and Simon J. Schwartz, with respect represents:

That in the present action their property has been attached whilst in their actual possession, they not being parties to the suit in which the process issued.

That they intervene, and make known to the Court that they are the *bona fide* owners of the property seized, and attached and desire the same restored to them until the final determination of this suit.

That in accord with Act 51 of 20th March, 1876, they are willing to execute a forthcoming bond in the same manner, and amount, within the same delay, and with the same effect as the defendant in the suit now allowed.

Intervenors further aver that keepers have been placed

upon the property of your petitioners herein at the expense of plaintiff.

That fresh goods and merchandise are arriving daily to them from New York, in due accord with a vast business conducted by them, employing more than two hundred and fifty (250) hands, who are under expense to your intervenor.

That they in vain have sought upon Canal Street, the main thoroughfare of the City, where their line of business exists, to obtain a locality since the destruction of their store by fire, without avail, and finally, after due deliberation, agreed with the firm of H. Kern & Son, of this city, to buy their stock of merchandise, with privilege of their lease, provided they incurred no trouble thereby.

That they agreed in said transfer to assume all goods ordered by said firm of H. Kern & Son in process of arrival, and pay therefor.

That they agreed with the landlord of said premises that the past due rental should be paid, inasmuch as a privilege under the laws of Louisiana existed in his favor, from which no relief could be had by said H. Kern & Son, but there was excluded by said H. Kern & Son from said sale, all and singular their other assets, bills receivable, open accounts, and property; all that was purchased by your intervenors being the stock in trade.

Intervenors further say that same was subject to long consultation in regard thereto, and the conclusion as to valuations of stock on hand for years, or some received at a later date, were concluded upon at a valuation stated in the annexed agreement of sale, at the price therein stated, but subject to increase or diminution of values as might be found by appraisement made by parties, made by parties mutually appointed to measure and determine the valuation of the respective goods, and quantities thereof, and in this your intervenors say they have not erred.

Intervenors further say that they are now, and were at the time of service of papers herein, in actual, physical possession of the property herein attached, as sole owners thereof, for value paid, and that said H. Kern & Son have no interest therein nor have your intervenors, of, in or to their personal affairs with their various creditors, save, and excepting, the matter of the claim of the landlord, and

for such claims as may occur from goods in transit and not yet received nor taken to account for which they have assumed responsibility.

Intervenors further say that they have duly applied to this Honorable Court for leave to bond said property, in order that they may re-enter upon their business relations with their great number of customers, and give employment to their various employes, and resume their trade, and that they have acted in good faith, for full value, as they believe and so charge, and as have said firm of H. Kern & Son, so far as they know.

Intervenors further aver, that having their force of some two hundred and fifty (250) employes on hand, under an expense exceeding Five Hundred $500 Dollars per day, they are deterred from entering upon their business of, and in relation to their purchase as aforesaid, and that they are suffering, and will suffer damages in said sum of $500 per day from the 22nd day of February, 1892, until the dissolution of this attachment, together with all counsel fees, and costs, as actual damages incurred by them in the premises by reason of the attachment herein.

Wherefore, intervenors pray that citation do issue to plaintiffs herein, as well as defendants, and that after due proceedings had their exceptions may be sustained, and that they be decreed the owners of the property herein attached; that said attachment may be dismissed with costs, and that they do have and recover judgment herein as against plaintiffs in the expense by them incurred in the sum Five Hundred $500 Dollars per day, during the existence of the attachment herein, say from the 22nd day of February, 1892, until dissolved, and all costs, and for all general relief in the premises. W. S. BENEDICT, *Atty.*

Let this petition of intervention be filed, and intervenors permitted to give bond in the sum of Twenty-Two Thousand Dollars, with good and solvent surety, sufficient to the satisfaction of the Marshal, conditioned according to law, upon which the Marshal is directed to release the attachment herein. EDWARD C. BILLINGS, *Judge.*

Feb. 23rd, 1892.

Copy of Petition of Intervention and Citation. Filed Feb. 25th, 1892.

The H. B. Claflin
vs.
H. Kern & Son.
A. Schwartz & Sons, Intervenors.
} No. 12,059.

To H. B. Claflin Company, Plaintiffs:

You are hereby summoned to comply with the demand contained in the petition of Intervention, of which a copy accompanies this Citation, or to deliver your answer to the same in the office of the Clerk of the Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, in the City of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the Court is held.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of New Orleans, this 24th day of February, A. D. one thousand eight hundred and ninety-two, and Independence of the United States of America the 116th year.

E. R. HUNT, *Clerk.*

Marshal' Return.

Received by U. S. Marshal, Feb. 24th, 1892, and on the same day, month and year I served certified copy hereof and accompanying petition of Intervention on The H. B. Claflin Co. by handing to Hon'l H. L. Lazarus, Atty. of of record, in person at his office, No. 188 Common street, New Orleans, La.

J. B. DONNALLY, *U. S. Marshal.*
By J. W. HUNTER.

Copy of Petition of Intervention and Citation. Filed Feb. 25th, 1892.

The H. B. Claflin Co.
vs.
H. Kern & Son,
A. Schwartz & Sons, Intervenors.
} No. 12,059.

The President of the United States of America, Greeting:
To H. Kern & Son, New Orleans, La.

You are hereby summoned, to comply with the demand contained in the petition of Intervention, of which a copy accompanies this Citation, or to deliver your answer to the same in the office of the Clerk of the Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, in the City of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the Court is held.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of New Orleans, this 24th day of February, A. D. one thousand eight hundred and ninety-two, and Independence of the United States of America the 116th year. E. R. HUNT, *Clerk.*

Marshal's Return.

Received by U. S. Marshal, Feb. 24 | 92, and on the same day, month and year I served certified copy hereof and accompanying petition of Intervention on H. Kern & Son, by handing same to Emile Kern in person, a member of said firm. J. B. DONNALLY, *U. S. Marshal.*
By J. W. HUNTER, *Dy U. S. Marshal.*

Motion to set aside order to give bond. Filed Feb. 25, 1892.

The H. B. Claflin Co. }
vs. } No. 12,059.
H. Kern & Son. }

On motion of Henry L. Lazarus, Attorney for the H. B. Claflin Co., plaintiffs herein, and on suggesting to the Court that A. Schwartz & Sons, Intervenors in the above numbered and entitled cause, in an *ex parte* proceeding, have obtained an order of Court to release the property attached on giving bond in the sum of Twenty-Two Thousand ($22,000.00) Dollars, conditioned according to law.

That said order was erroneously granted, and not in conformity to law, nor the law under which Intervenors claim the right to bond.

That said A. Schwartz & Sons have filed a pretended and so-called release bond, predicated upon said order, which has been accepted by the Marshal.

That said bond is not made payable to the proper parties and is not conditioned according to law.

It is therefore ordered that said A. Schwartz & Sons show cause on Saturday, February 27th, A. D. 1892, at 11 o'clock A. M., why said order should not be set aside as having been erroneously granted, and why they should not give a release bond as the law directs; and, in default of giving said bond, why the Marshal should not retake possession of the property attached.

New Orleans, Feb. 25th, 1892.

Marshal's Return.

Received by U. S. Marshal, Feb. 25 | 92, and on the same day, month and year, I served certified copy hereof on Mess. A. Schwartz & Sons, by leaving same in the hands of L. L. Schwartz, personally, a member of said firm, in New Orleans, La.

J. B. DONNALLY, *U. S. Marshal.*
by J. W. HUNTER, *Dy. U. S. Marshal.*

Extract from Minutes. November Term, 1891.

New Orleans, Saturday, February 27th, 1892.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, District Judge.

The H. B. Claflin Co. } No. 12,059.
vs.
H. Kern & Son.

This cause came on this day to be heard on the rule of Plaintiffs to set aside the release bond given by A. Schwartz & Sons, intervenors.

H. L. Lazarus & H. C. Leake, appearing for movers, W. S. Benedict, for Intervenors, and was argued by counsel and submitted.

Extract from Minutes. November Term, 1891.

New Orleans, Monday, February 29th, 1892.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, District Judge.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause having been heard on the Rule of plaintiffs to set aside the release bond given by A. Schwartz & Sons, Intervenors, and submitted, and counsel for Intervenors now consenting that said Rule be made absolute, it is now ordered, on motion of counsel for plaintiffs, that the said Rule be and the same is hereby made absolute.

Exception of H. Kern & Son. Filed March 4 | 92.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

Now, into this Honorable Court, come H. Kern & Son, defendants, and except to the plaintiff's petition, and for cause of exception say:

1. That these defendants applied for a respite under the laws of this State, and by a judgment of the Court having jurisdiction of said matter, to-wit: the Civil District Court for the Parish of Orleans, being No. 33,424 of the Docket thereof, they were granted an extension of time within which to pay their debts, and the first payment under said judgment will not become due until March 13th, 1892, as will fully appear by reference to a certified copy of said judgment, hereto annexed as part hereof.

That the H. B. Claflin Co., plaintiff, made no opposition to said application and judgment, but, on the contrary, have acquiesced therein and assented thereto, and are bound by said proceedings, as defendants will fully show on the trial hereof.

Defendants further except that the plaintiff's action is premature.

Wherefore, defendants pray that these exceptions be maintained, and plaintiff's petition be hence dismissed at its costs, and for judgment and general relief.

PERCY ROBERTS,
MOISE & TITCHE,
F. J. DREYFOUS,
Attys. for defendants.

Motion to quash attachment. Filed March 4th, 1892.

The H. B. Claflin Co.
vs. } No. 12,059.
H. Kern & Son.

On motion of Percy Roberts, F. J. Dreyfous and Moise & Titche, Attorneys for defendants:

It is ordered that plaintiff, the H. B. Claflin Co., show cause on Saturday, the 19th day of March, 1892, why the writ of attachment herein should not be quashed, dissolved and set aside on the grounds following, to-wit:

1. That the bond given for same is informal and invalid and not such as the law requires; and that the amount thereof is insufficient.

2. That the surety on said bond is not good and solvent, such as the law requires.

3. That the affidavit on which said writ of attachment issued is informal, invalid and not sufficient to justify the writ.

4. That the affiant in said affidavit was not authorized to make the same.

5. That all and singular the allegations and averments of the petition and affidavit upon which this writ of attachment in this Case issued are untrue and false.

Marshal's Return.

Received by U. S. Marshal, Mch. 5 | 92, and on the same day I served certified copy hereof on the H. B. Claflin Co. by handing same to Judge H. L. Lazarus, Atty. of record, in person, in New Orleans.

J. B. DONNALLY, *U. S. Marshal.*
By JAMES R. PINNIGRE, *Dy. U. S. Marshal.*

Answer to Intervention. Filed March 5 | 92.

The H. B. Claflin Co.
vs. } No. 12,059.
H. Kern & Son.

Now into Court comes the H. B. Claflin Co., Plaintiffs herein, through their undersigned counsel, and for answer to the petition of intervention, filed by A. Schwartz & Sons, they deny all and singular the allegations therein contained.

Further answering, Plaintiffs specially deny that the property attached and claimed by intervenors was in their possession at the time the writ was levied; but respondents aver that said property at that time belonged to the defendants, H. Kern & Son, and as such was liable for their debts, including the debt due the Plaintiffs herein.

Wherefore, respondents pray that said intervention may be dismissed with costs.

HENRY L. LAZARUS,
HUNTER C. LEAKE,
GUS. LEMLE,
Attorneys for the H. B. Claflin Co.

Order—Continuance of Motion to Quash Attachment.

Extract from the Minutes, Saturday, March 19th, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son. } No. 12,059.

On joint motion of counsel for the parties, plaintiff, and defendant, it is ordered that the motion to quash the writ of attachment issued herein, be continued to Monday, March 28, 1892, at 11 A. M.

Supplemental Answer of A. Shwartz & Sons, garnishees. Filed March 22, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son. } U. S. Circuit Court. No. 12,059.

Now comes and appears A. Shwartz & Sons, garnishees herein, and for supplemental to their answer as garnishees, hereinbefore filed, beg leave to say that they desire to supplement their said answer:

From conclusions reached, after final inventory of H. Kern & Son was taken and measured, there remains a balance of said purchase price over and above the amount

hereinbefore paid of Seven Thousand and two dollars, for which they have duly accounted in due accord with law.

(Signed) A. SHWARTZ & SONS,
per N. I. SHWARTZ.

Sworn to and subscribed before me, this 26th day of Feby., 1892.

[SEAL] (Signed) F. J. DREYFOUS, *Not. Pub.*

Bond given by A. Shwartz & Sons. Filed March 26, 1892.

Know All Men, That we, A. Shwartz & Sons, as principals, Intervenors herein, and Gustave Lehmann, as sureties, Are held unto J. B. Donnally, U. S. Marshal, in the penal sum of ($35,000.00) Thirty-five thousand dollars, for the payment whereof to the said Marshal, his executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators, respectively by these presents; as witness our respective names hereunto affixed, at New Orleans, this 1st day of March in the year one thousand eight hundred and ninety-two.

Whereas, in and by virtue of a writ of Attachment issued out of the Honorable the Circuit Court of the United States, at the suit of The H. B. Claflin Co. vs. H. Kern & Son, and numbered 12,059 on the Docket of the said Court, and which suit is now pending therein, the following described property, to-wit: All and singular the stock in trade, goods, merchandise, etc., as the same was contained in the store of defendants, situated at the corner of Dauphine and Canal streets in this city, has been seized, taken into the custody of the said Marshal and detained according to law; but the same has been claimed by A. Shwartz & Sons, Intervenors, and has been released and delivered to them upon their appearance in the said suit, and delivering to the said Marshal the present obligation: *The Condition of which is such*, that if the said Intervenors shall produce the property to meet the judgment of the Court, or satisfy such judgment as may be rendered, then this obligation to be void, or else to remain in full force, virtue and effect.

(Signed) A. SHWARTZ & SONS,
by N. I. SHWARTZ,
G. LEHMANN.

Signed and Delivered in presence of:
(Signed) T. J. GALBRETH.

Affidavit.

State of Louisiana,
Clerk's Office, U. S. Circuit Court, 5th Judicial Circuit, Eastern Dist. of La.

I, G. Lehmann, do solemnly swear, that I reside in the Parish of Orleans; that I have property in my own right, unincumbered and of sufficient value to satisfy amount of within bond, and that after the payment of all my debts and liabilities I am worth over and above the said amount, and that I am not tutor of minor children; that there exists no legal impediment to my signing said bond, and that I have not signed any obligation which may vitiate the validity of this bond. (Signed) G. LEHMANN.

Sworn to and subscribed before me, this 1 day of March, 1892. (Signed) E. R. HUNT,
Clerk U. S. Circuit Court, Eastern District of La.

Transfer.

State of Louisiana,
Parish of Orleans, U. S. Marshal's Office, Eastern District of Louisiana.

New Orleans, March 2nd, 1892.

I do hereby transfer, assign and set over to The H. B. Claflin Co. herein, all my right, title and interest in and to the within bond.

(Signed) J. B. DONNALLY,
United States Marshal, Eastern District of Louisiana.

(Received by U. S. Marshal, New Orleans, La., March 1st, 1892).

Order—Continuance.

Extract from the Minutes, Monday, March 28, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son. } No. 12,059.

This cause not being reached for want of time, on motion

of counsel for the parties, it is ordered that the same be continued to Monday, April 4, 1892, at 11 A. M., and the witnesses were notified to appear on said date.

Hearing and Continuance.

Extract from the Minutes. Monday, April 4, 1892.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause was called for trial on the motion of defendants to quash the writ of attachment herein issued.

Present: H. L. Lazarus, attorney for plaintiff,

Present: Percy Roberts, Moise & Titche, and F. J. Dreyfous, for the defendants;

whereupon counsel for plaintiffs applied for a continuance of the case for one week; defendants objecting, after hearing the attorneys for both parties, the Court ordered the cause to be continued to Friday, April 8, 1892, at 11 A. M.

Jury empanneled, Hearing and Continuance.

Extract from the Minutes. April 8th, 1892.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause was called for trial this day on the motion filed by the defendants to set aside the writ of attachment issued herein February 22, 1892.

Present: Percy Roberts, Moise & Titche and F. J. Dreyfous, attorneys for H. Kern & Son, plaintiff in motion,

H. L. Lazarus, H. C. Leake & Gus Lemle, for H. B. Claflin Co., defendants in Rule,

whereupon the following named jurors were called and sworn to well and truly try the issue joined, to-wit:

1. J. A. Gauche,
2. J. W. Homan,
3. Henry Street,
4. P. B. Caufield,
5. Ed. G. Schlieder,
6. A. LaFleur,
7. James H. Wright,
8. Michael Foley,
9. Wm. Bingham,
10. Henry Grathan,
11. Noah Wells Longshore,
12. McC. Campfield,

when the Court appointed J. A. Gauche foreman of the said Jury. On motion of attorneys for defendants in rule, the witnesses in the cause were directed to retire to the adjoining room. After hearing the pleadings, the cause was continued to Monday, April 11th, 1892, for further hearing, the court cautioning the jurors not to converse with any one touching the cause.

Continuance.

Extract from the Minutes of April 11, 1892.

The H. B. Claflin Co., Limited,
vs.
H. Kern & Son. } No. 12,059.

On motion of H. L. Lazarus, of counsel for plaintiff, suggesting the absence of attorneys for defendants, it is ordered that this cause go over to Wednesday, April 13, 1892, at 11 A. M., to be resumed on the trial of the motion to set aside the writ of attachment.

Hearing and Continuance.

Extract from the Minutes of April 13, 1892.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause, as continued from Friday, April 8, 1892, was this day resumed on the motion of defendants to set aside the writ of attachment herein issued, and the counsel for the respective parties, as well as the jurors empanneled in the cause, being all present, the trial was proceeded with. After hearing the evidence in part the Court ordered the cause to go over until to-morrow at 11 A. M.

Order—H. J. Carter, Esq., appointed Expert to report amount of purchases made, etc.

Extract from the Minutes of April 14, 1892.

H. B. Claflin Co. vs. H. Kern & Son. No. 12,059.

On motion of H. L. Lazarus, of counsel for plaintiffs in this cause, it is ordered that H. J. Carter, Esq., be appointed as an expert to compile and report the amount of purchases made by defendants from July 14, 1891, to February 22, 1892, as per the invoices.

It is further ordered that the fees of said expert be taxed as costs in the cause.

Hearing and Continuance.

Extract from the Minutes of April 14, 1892.

H. B. Claflin
vs. } No. 12,059.
H. Kern & Son.

This cause, as continued from yesterday, came on this day to be further heard on the motion of the defendants to set aside the writ of attachment herein, and the counsel for the parties respectively, as well as the jurors empanneled in the cause, being all present, the trial was proceeded with. After hearing further evidence, the Court ordered the cause to go over until to-morrow at 11 A. M.

Hearing and Continuance.

Extract from the Minutes of April 15, 1892.

The H. B. Claflin Co.
vs. } No. 12,059.
H. Kern & Son.

This cause came on this day to be further heard, on the motion of the defendants herein to set aside the writ of attachment, and the attorneys for the parties respectively, as well as the jurors empanneled in the cause, being all present, the trial was proceeded with. After hearing further evidence, the court ordered the cause to go over until Monday, April 18, 1892, at 11 A. M.

Hearing and Continuance.

Extract from the Minutes of April 18, 1892.

The H. B. Claflin Co.
vs. } No. 12,059.
H. Kern & Son.

This cause, as continued from Friday, April 15, 1892, came on this day to be further heard on the motion of the defendants to set aside the writ of attachment herein, and the attorneys for the parties respectively and the jurors empanneled in the cause, being all present, the trial was proceeded with. After hearing further evidence, the Court ordered the cause to go over until to-morrow at 12 M.

Hearing and Continuance.

Extract from the Minutes of April 19, 1892.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause, as continued from yesterday, came on this day to be further heard on the motion to set aside the writ of attachment herein, and the attorneys for the parties respectively, as well as the jurors empanneled in the cause, being all present, the trial was proceeded with. After hearing further evidence, the Court ordered the cause to go over until to-morrow at 11 A. M.

Hearing and Continuance.

Extract from the Minutes of April 20, 1892.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause as continued from yesterday came on this day to be further heard on the motion of defendants to set aside the writ of attachment herein, and the attorneys for the respective parties, as well as the jurors empanneled in the cause, being all present, the trial was proceeded with. After hearing further evidence, the cause was ordered to be continued until to-morrow at 11 A. M.

Continuance.

Extract from the Minutes of April 21, 1892.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause as continued from yesterday was this day resumed, when on motion of Gus. Lemle, of counsel for H. B. Claflin & Co., suggesting that H. L. Lazarus, Esq., and H. C. Leake, Esq., also of counsel for H. B. Claflin Co., are ill, and unable to be present, it is ordered that the case be continued until to-morrow at 11 A. M., counsel for H. Kern & Son being present and consenting.

Hearing and Continuance.

Extract from the Minutes of April 22, 1892.

H. B. Claflin Co. vs. H. Kern & Son. } No. 12,059.

This cause as continued from yesterday came on this day to be further heard on the motion of the defendants to set aside the writ of attachment herein, and the attorneys for the respective parties, except H. C. Leake, of counsel for plaintiff, being present, and the jurors empanneled in the cause being all present, the trial was proceeded with. After hearing further evidence, the Court ordered the cause to go over until to-morrow at 12 M.

Hearing and Continuance of cause to April Term, 1892.

Extract from the Minutes of April 23, 1892.

The H. B. Claflin Co. vs. H. Kern & Son. } No. 12,059.

This cause came on this day to be further heard on the motion of defendants to set aside the writ of attachment herein, and the attorneys for the parties respectively, as well as the jurors empanneled in the cause, being all present, the trial was proceeded with and further evidence heard. And this trial having commenced and having progressed at the November Term of this Court, and being now in progress and not completed, and this day being the last day of said November Term of this Court, it is ordered that the trial of this cause proceed on Tuesday, the 26th instant, at 11 A. M., of the April Term of this court and that the same proceed to a conclusion in the same manner and to the same effect as if the said April Term had not intervened, as provided in section 746 of the Revised Statutes of the United States.

Hearing and Continuance.

Extract from the Minutes of April 26, 1892.

H. B. Claflin Co. vs. H. Kern & Son. } No. 12,059.

This cause, as continued from last Saturday, came on this day to be further heard on the motion of the defendants to

set aside the writ of attachment herein, and the attorneys for the parties respectively, as well as the jurors empanneled in the cause, being all present, the trial was proceeded with. After hearing further evidence the Court ordered the cause to go over until to-morrow at 11 A. M.

Hearing and Verdict on Rule of Defendants to set aside Attachment.

Extract from the Minutes of April 27, 1892.

H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause as continued from yesterday came on this day to be further heard on the motion of the defendants to set aside the writ of attachment herein, and the attorneys for the parties respectively, as well as the jurors empanneled in the cause, being all present, the trial was proceeded with. After hearing arguments of counsel and receiving a charge from the court, the said jury retired to deliberate as to their verdict. After due deliberation the said jury returned into court and then and there in open court, through their said foreman, J. A. Gauche, did render and deliver the following verdict:

New Orleans, La., Apl. 27th, 1892.

We, the Jury, find a verdict in favor of the plaintiff, H. B. Claflin Co., against the defendants, H. Kern & Son.

JOSEPH A. GAUCHE, *Foreman.*

Whereupon it was ordered that the said verdict be received and it was done accordingly. And the said Jury having so found, rendered and declared their said verdict as aforesaid, on motion of counsel for H. Kern & Son, plaintiffs in rule, it was ordered by the court that said jury be polled, and on being in due form of law severally called upon and interrogated, each of said jurors for himself, in open court, then and there did declare the said verdict to be his true verdict in the premises, and thereupon the court did then and there order the said verdict to be recorded, and the jurors were discharged from further consideration of the cause.

Rule for New Trial. Entered and filed April 30, 1892.

The H. B. Claflin Company *vs.* H. Kern & Son.	No. 12,059. Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

On motion of Percy Roberts and Moise & Titche, Attorneys for H. Kern & Son, the defendants herein, and on showing to the Court that the verdict herein found by the Jury on Wednesday, the 27th day of April, 1892, is contrary to law and the evidence:

It is ordered that plaintiff show cause at 11 A. M. on Monday, the 9th day of May, 1892, why the said verdict should not be set aside and a new trial be granted, on the grounds following, to-wit:

1. That the Court erroneously excluded evidence tendered by the defendants to establish their good character and reputation after their character had been directly and directly assailed by the plaintiff.

2. That the instruction delivered by the Court to the Jury was insufficient, incomplete and erroneous.

3. That said instruction was involved in its grammatical construction, and ambiguous, and gave an unfair interpretation of the law.

4. That said instruction, by reason of its involved character, was calculated to mislead, and actually did confuse and mislead the Jury.

5. That the Court erred in refusing each and every one of the charges requested by defendants.

On the foregoing grounds, and on the further ground of the adverse rulings of the Court on the various questions of evidence which arose during the trial of the cause, and which said rulings were duly excepted to by counsel of defendants; and for other grounds of law which counsel of defendants ask leave to adduce on the hearing of this motion, this motion is submitted.

Marshal's Return.

Received by U. S. Marshal, New Orleans, La., May 2 | 92, and on the same day I served certified copy hereof on Judge

H. L. Lazarus by handing same to him, in person, in New Orleans, La.

(Signed) J. B. DONNALLY, *U. S. Marshal.*
By J. E. BOEHLER, *Dy. U. S. Marshal.*

Order—Rule for New Trial continued.

Extract from the Minutes of May 9th, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son. } No. 12,059.

On motion of counsel for H. Kern & Son, counsel for H. B. Claflin Co. consenting, it is ordered that the Rule for a new trial be continued to Monday, May 16, 1892, at 11 A. M.

Amended Motion for New Trial. Filed May 14, 1892.

The H. B. Claflin Company *vs.* H. Kern & Son. } No. 12,059. Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

This amended motion for a new trial, filed by permission of the Court, submits the following additional ground in support of the motion:

That the instruction of the Court to the Jury in this case did, as a matter of fact, mislead the Jury in such wise that they rendered a verdict which was not responsive to the issue involved in the rule to dissolve the attachment, but was a verdict, in reality, on the money demand set up by the plaintiffs in the attachment.

Order—Continuance of Rule.

Extract from the Minutes of May 16, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son. } No. 12,059.

On application for counsel for H. B. Claflin Co., attorneys for the defendant consenting, it is ordered that the Rule for a new trial herein be continued.

Hearing and Submission of Rule for New Trial.

Extract from the Minutes of May 23, 1892.

H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause came on to be heard on the Rule for a new trial filed by H. Kern & Son, defendants, on the motion to set aside writ of attachment herein.

Present: H. L. Lazarus of counsel for complainants,
" B. Titche of counsel for defendants,
and was submitted—when the Court took same under advisement.

Order—Exceptions re-assigned.

Extract from the Minutes of Nov. 18, 1892.

H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

By agreement of counsel for the parties, the Exceptions fixed for trial on Saturday, Nov. 19, 1892, are re-assigned for Nov. 22, 1892.

Exceptions submitted.

Extract from the Minutes of Nov. 22, 1892.

H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause came on to be heard upon the Exception of prematurity filed by defendants,

Lazarus, Moore & Lemle, appearing for plaintiff,

B. Titche, for the defendants,
and was argued by the counsel for the parties respectively and submitted—when the Court took time to consider.

Exception overruled.

Extract from the Minutes of November 24, 1892.

H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause came on to be heard upon the exception of

prematurity filed by defendant, and after argument of the counsel for the parties was submitted; on consideration whereof, it is ordered that the said Exception be and the same is hereby overruled.

Default.

Extract from the Minutes of Nov. 25, 1892.

H. B. Claflin Co. } No. 12,059.
vs.
H. Kern & Son. }

On motion of H. L. Lazarus, of counsel for plaintiff, and on showing to the court that the defendants have failed to answer the petition herein, although duly cited:

It is ordered that judgment by default be entered against the said defendants.

Answer of H. Kern & Son. Filed Nov. 28, 1892.

The H. B. Claflin Co. } No. 12,059.
vs. } United States Circuit Court, East-
H. Kern & Son. } ern District of Louisiana.

Now into Court, by their undersigned counsel, come defendants herein, and reserving all their right to sue for damages for the unwarranted and illegal attachment herein issued, and reserving the benefit of their exception herein filed, say with respect:

That they deny all the allegations of plaintiff's petition, and pray to be hence dismissed with their costs, and for general relief. (Signed) PERCY ROBERTS,
BERNARD TITCHE,
Attorneys for defendants.

Order—Default set aside.

Extract from the Minutes. November 28, 1892.

H. B. Claflin & Co. } No. 12,059.
vs.
H. Kern & Son. }

On motion of B. Titche, of counsel for the defendants, and on suggesting that they have this day filed an answer:

It is ordered that the judgment by default, entered Nov. 25, 1892, be set aside.

Document "M"—Motion of A. Schwartz & Son, Intervenors, to set aside Attachment. Filed Dec. 6, 1892.

The H. B. Claflin Co. vs. H. Kern & Son, etc. } No. 12,059. U. S. Circuit Court.

And now come A. Schwartz & Son, Intervenors herein, and suggest to the Court that H. Kern & Son have in their cause, No. 33,424 of the Civil District Court, "H. Kern & Son vs. Their Creditors," been declared insolvents, and Victor Mauberret, Civil Sheriff of Orleans, appointed Provisional Syndic, and qualified as by annexed letters appear —and that thereby the attachment herein has been set aside, and they move the Court to so declare and to set aside the attachment by proper order.

(Signed) W. S. BENEDICT,
W. W. HOWE, *Attys.*

Document "N"—Provisional Syndic's Letters. Filed Dec. 6, 1892.

No. 33,424.

H. Kern & Son vs. Their Creditors.

State of Louisiana.

Civil District Court for the Parish of Orleans. Division "D."

This shall certify to all whom it may concern, That on the 28th of November in the year of our Lord one thousand eight hundred and ninety-two, and the one hundred and 17th of the Independence of the United States of America, Judgment rendered by the Honorable W. H. Rightor, Judge of the Civil District Court for the Parish of Orleans, Division D, appointing Victor Mauberret, Provisional Syndic of the Creditors of H. Kern & Son, and Henry Kern and Emile Kern, insolvents herein.

Now, know ye, That Victor Mauberret, Civil Sheriff, has been and he is hereby appointed Provisional Syndic of the Creditors of the said Insolvents, and that he has fulfilled all the requisites of the law.

[STAMP] [STAMP] Witness our hand and the seal of the said Civil District Court this 30 day of November in the year of our Lord one thousand eight hundred and ninety-two, and

in the one hundred and 17th of the Independence of the United States.

(Signed) N. H. RIGHTOR, *Judge.*
(Signed) JAS. D. RANKIN, *Dy. Clerk.*

A true copy:
[SEAL] (Signed) JAS. D. RANKIN, *Dy. Clk.*

Order on Documents "M" & "N."
Extract from the Minutes of Dec. 6, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son. } No. 12,059.

In this cause, Judge W. W. Howe, as counsel for A. Shwartz & Sons, presented the motion marked "M" in connection with Exhibit "N," which the court allowed to be filed, and directed that it should be heard on the motion for a new trial, without prejudice and with the same effect as if it had been heard to-day.

Motion of V. Mauberret, Sheriff, Prov. Syndic, etc., to set aside Attachment. Filed Dec. 6, 1892.

The H. B. Claflin Co. *vs.* H. Kern & Son. } United States Circuit Court, Eastern Dist. of La. No. 12,059.

And now come Victor Mauberret, Civil Sheriff of the Parish of Orleans, and Provisional Syndic of the Commercial firm of H. Kern & Son and of H. Kern and Emile Kern, Insolvents, duly appointed as such Syndic by an order and decree of the Hon'l the Judge of Div. D, of the Civil District Court for the Parish of Orleans, rendered Nov. 30th, 1892, a true copy of said order and decree is annexed to the Intervention of A. Schwartz & Son filed herein, and is for greater certainty made part of this Intervention—and on further suggesting that he has qualified according to law as such Syndic and has notified the said Insolvents of said fact and ordering them to turn over to him in his capacity aforesaid all their assets, etc.

And that thereby the attachment herein has been set

aside and he moves the Court to so declare and to set aside the attachment by proper order.

(Signed) WYNNE ROGERS,
Atty. of V. Mauberret, Sheriff & Prov. Syndic, etc.

Order upon Motion of Provisional Syndic to set aside Attachment.

Extract from the Minutes. Dec. 6, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son. } No. 12,059.

In this cause, Wynne Rogers, attorney of V. Mauberret, provisional syndic, etc., presented a motion to set aside the attachment, which the court allowed to be filed, and directed that it should be heard on the motion for a new trial, without prejudice and with the same effect as if it had been heard to-day.

Order refusing New Trial upon Motion to dissolve attachments.

Extract from the Minutes of Dec. 6, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son. } No. 12,059.

The rule for a New Trial upon the motion of defendant to dissolve the writ of attachment herein, came on at a former day to be heard, and without argument was submitted and taken under advisement; on consideration whereof, it is now ordered that a new trial be and the same is hereby refused,

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Stipulation. Filed Dec. 6, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son, Deft. A. Schwartz & Sons, Intervenors. } No. 12,059. U. S. Circuit Court.

It is understood and agreed that this case is not this day to be tried as between the plaintiff and the Intervenors, and that no proceedings, verdict or judgment, as between plaintiffs and the defendants, shall in any wise prejudice the

rights of the intervenors under their motion this day filed, nor as to their title to property, nor otherwise: intervention to be tried hereafter.

(Signed) W. W. HOWE,
W. S. BENEDICT,
Attys. for Intv'r.
LAZARUS, MOORE & LEMLE,
For Piffs.

Jury empanneled, Hearing, and Verdict. Extract from the Minutes of Dec. 6th, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son. } No. 12,059.

This cause was called for trial, whereupon counsel for defendant applied for a continuance, and the plaintiffs objecting and insisting on a trial, the Court heard argument pro and con.; and after consideration thereof the Court overruled the motion for a continuance, and ordered the cause to proceed.

Lazarus, Moore & Lemle appearing for plaintiff,

B. Titche for the defendants;

whereupon the following named jurors were called and sworn to well and truly try the issue joined herein, to-wit:

1. M. Gosselin,
2. Thos. S. Burbank,
3. Hy. Thezan,
4. S. Gay,
5. J. B. Singer,
6. Hy. Tebbe,
7. Hy. Thoele,
8. Pat Hurley,
9. M. W. Evans,
10. J. E. Chaffee,
11. W. H. Wendt,
12. R. G. Hurlbut,

when the Court appointed M. Gosselin, foreman of the said Jury and the trial was proceeded with. After hearing the pleadings, evidence, counsel, and receiving a charge from the court, the jury retired to deliberate as to their verdict. After due deliberation the said jury returned into court and then and there, through their said foreman, in open court, did render and deliver their verdict as follows:

New Orleans, Dec. 6 | 92.

We, the Jury, find a verdict for plaintiffs, H. B. Claflin & Co., against the defendants in the sum of Twenty-one thousand seven hundred and twenty-eight dollars, $21,728.00,

with legal interest from maturity as claimed in the petition, and privilege of attachment.

MARTIAL GOSSELIN, *Foreman.*

whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

Remittitur of $6. Filed Dec. 6, 1892.

The H. B. Claflin Co. vs. H. Kern & Son. } No. 12,059. U. S. Circuit Court.

And now comes the H. B. Claflin Co., plffs. herein, and remits the sum of Six dollars upon the verdict and demand—there having been an error in the addition of the various items set out on the petition and sued for herein.

Wherefore, plffs. prays for judgment as rendered by the verdict, save and except the sum of Six dollars remitted herein.

Order continuing Motions of A. Shwartz & Sons and Prov. Syndic to Dissolve Attachment.

Extract from the Minutes of Dec. 7, 1892.

The H. B. Claflin Co. vs. H. Kern & Son. } No. 12,059.

On motion of Lazarus, Moore & Lemle, of counsel for plff. herein:

It is ordered by the Court that the motion to dissolve attachment filed herein by Victor Mauberret and A. Shwartz & Sons, be set for trial on Saturday, the 10th day of December, 1892, at 11 o'clock A. M., and that Wynne Rogers and W. W. Howe, and W. S. Benedict and Bernard Titche, of counsel of record in this cause for said parties, be notified thereof.

Rule of H. Kern & Son for New Trial. Entered and Filed Dec. 8, 1892.

The H. B. Claflin Co. vs. H. Kern & Son. } No. 12,059. United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

On motion of Percy Roberts and Bernard Titche, attor-

neys for defendants herein, and on showing to the Court that the verdict herein rendered is contrary to law and evidence, for the following reasons, namely:

1st. Because the only matter before the Court and the jury for determination on the day of trial was the existence or not of the pretended indebtedness alleged by the plaintiff to be due to it by these defendants.

2nd. That the Court erred in allowing any evidence concerning any attachment or affidavit for an attachment to go to the jury, as the validity of the attachment was not in question.

3rd. That the motion of these defendants to obtain from this Court a new trial of their motion to quash, dissolve and set aside the attachment herein, was still pending and undecided at the time this cause was set down for trial and at the time these defendants were notified thereof, and was pending and undecided on the day the case was called up in this Court for trial, and was not passed upon until the jury had been impanelled in this cause, and it was, therefore, error to refuse these defendants their motion then made for a continuance, in order that they might prepare themselves for the new aspect which the case had assumed.

4th. That the objections made by all parties going to trial upon this cause, upon the ground that these defendants had been put into insolvency in the matter of their proceedings in the Civil District Court of this Parish, entitled H. Kern & Son vs. Their Creditors, number 33,424 of the Docket, and that the attention of the Court having been called to the fact that the Provisional Syndic was in charge of the assets of these defendants.

5th. That, at any rate, all demands on the part of plaintiff to obtain the judgment upon his attachment should have ceased upon this showing, and he should have been confined to the obtaining of a monied judgment against these defendants.

It is ordered that the plaintiff show cause on Saturday, the 10th day of December, 1892, at 11 o'clock, why a new trial should not be granted of this cause.

Marshal's Return.

Received by U. S. Marshal, New Orleans, La., Dec. 8 | 92, and on the same day I served copy hereof on Mess. Lazarus, Moore and Lemle, by handing the same to Judge H. L. Lazarus, a member of said firm in person, in the City of New Orleans, La.

(Signed) J. B. DONNALLY,
U. S. Marshal.
By J. E. BOEHLER,
Deputy U. S. Marshal.

Order of Court accepting Cession of H. Kern & Son, calling meeting of Creditors to elect Syndic, etc. Offered by Syndic Dec. 10 | 92, and filed.

State of Louisiana.

Civil District Court for the Parish of Orleans.

H. Kern & Son } No. 33,424.
vs. }
Their Creditors } Division

Order of Court.

Let the cession of property of petitioner, the commercial firm of H. Kern and Son and of the Individual members thereof, be and the same is hereby accepted by the Court for the benefit of their Creditors, and it is ordered that a meeting of said creditors be convened and held before Joseph N. Wolfson, Esq., Notary Public, at his office, No. 6 Carondelet st. in this City, commencing on Thursday the 30th day of December, 1892, at 11 o'clock A. M., for the purpose of deliberating upon the affairs of said petitioners, electing a Syndic, voting upon their applications for a discharge, and upon all other matters that may be brought before them, and in the meantime all Judicial proceedings against their persons as well as their property be stayed, and let Horace L. Dufour, Esq., Attorney-at-Law, be appointed to represent the absent Creditors herein.

New Orleans, December 8th, 1892.

(Signed) N. H. RIGHTOR, *Judge.*

A true copy:
[SEAL] (Signed) GEO. W. PRADOS, *dy. clk.*

Exception to Motion for New Trial by Victor Mauberret, Prov. Syndic. Filed Dec. 10, 1892.

The H. B. Claflin Co. } No. 12,059.
vs. } U. S. Circuit Court for the fifth Cir-
H. Kern & Son. } cuit and Eastern Dist. of Louisiana.

Now into this honorable Court come The H. B. Claflin Co., through their undersigned counsel, and object to this honorable Court considering the motion for a new trial herein, made by Victor Mauberret, styling himself provisional syndic of H. Kern & Son, and for cause of objection say: that the said Victor Mauberret is absolutely without right to be heard herein, his appointment as such alleged provisional syndic having been revoked, cancelled and annulled by the Honorable the Civil District Court for the Parish of Orleans, as will appear by a certified copy of the decree to that effect, hereunto annexed and made part hereof. (See p. 95).

Wherefore, the said H. B. Claflin Co. urge this their exception against hearing or considering any application, motion or plea of any kind, character or cause whatsoever herein, made by said Victor Mauberret in his pretended capacity as provisional syndic.

(Signed) LAZARUS, MOORE & LEMLE,
Attys. for Plffs.

The certified copy of decree of Supreme Court is found at p. 95, *et seq.*

Decree annulling appointment of Provisional Syndic, etc. Made part of Plaintiff's Motion and filed Dec. 10 | 92.

[STAMP] State of Louisiana.
Civil District Court for the Parish of Orleans.
No. 33,424, Div. D.

H. Kern & Son }
vs. }
Their Creditors. }

Considering the written consent of Silberberg Brothers, Jennings Lace Works, Jamison & Moss, L. S. Davidson & Son, Strawbridge & Clothier and Sharpless Brothers, on whose instance the decree rendered herein on the 28th of November, 1892, and signed December the 2nd, 1892, and by which decree it was ordered that H. Kern & Son and Henry Kern and Emile Kern do make a Cession of their property to their creditors, and on whose instance Victor

Mauberret, Civil Sheriff for the Parish of Orleans, was appointed Provisional Syndic, and it being further made to appear that the said H. Kern & Son and Henry Kern and Emile Kern have not made a Cession of their property, nor have they surrendered the same under the aforesaid judgment, and that the Provisional Syndic aforesaid has not gone into actual possession of the property, rights, actions or assets of the said H. Kern & Son, or the individual members thereof, and it being made further to appear to this Court that the above state creditor assent and agree to the revocation, annullment and cancellation of the said judgment rendered and signed as aforesaid, and the law and the evidence being in favor of the above named creditors:

It is ordered, adjudged and decreed, That the judgment of this Court rendered on the 28th day of November, 1892, and signed December 2nd, 1892, ordering and commanding that the respite proceedings be vacated, and that Henry Kern and Emile Kern, do make a surrender of their property to their creditors, and that Victor Mauberret, Civil Sheriff, be appointed Provisional Syndic, and that said H. Kern & Son and Henry Kern and Emile Kern, be ordered to surrender their property, rights, actions and assets of every nature and kind to said Syndic, and ordering a Meeting of the Creditors before Joseph N. Wolfson, notary public, on the 30th of December, 1892, be and the same is hereby revoked, annulled, cancelled and set aside, and declared of no force, virtue or effect whatsoever.

And it is further ordered, adjudged and decreed, that the appointment of Victor Mauberret, as Provisional Syndic herein, and Joseph N. Wolfson, as notary public herein, be and the same is hereby re-called, cancelled, annulled and declared of no force, virtue or effect whatsoever, and the bond of said syndic is hereby ordered cancelled and annulled.

Judgment rendered and signed, this 9th day of December, 1892. (Signed) N. H. RIGHTOR, *Judge.*

A true copy:

[SEAL] (Signed) JULES VIENNE, *Dy. Clk.*

A true copy:

(Signed) GEO. W. PRADOS, *Dy. Clk.*

Motion of A. Shwartz & Sons as to Cession of property of Kern & Son. Filed Dec. 10th, 1892.

The H. B. Claflin Co., L'd. } U. S. Circuit Court,
vs. } No. 12,059.
H. Kern & Son.

And now, supplementing their motion of December 6th, 1892, come A. Schwartz & Sons, and show that on the 8th day of December, 1892, the said H. Kern & Son made a cession of all their property in the cause No. 33,424 of the Civil District Court for the Parish of Orleans, under the insolvent laws of Louisiana, and said cession was duly accepted by said Civil District Court on said 8th December instant, as by copies of proceedings there had will appear—and the attachment herein has been by said proceedings set aside—and they pray that the fact be now decreed.

(Signed) W. W. HOWE,
W. S. BENEDICT,
Attys. for A. Schwartz & Sons.

Proceedings of Cession of Property made by H. Kern & Son, in the Civil District Court on Dec. 8th, 1892, in the cause No. 33,424 of the Docket. Made part of Motion of Schwartz & Sons. Offered and filed December 10th, 1892.

H. Kern & Son } No. 33,424.
vs. } Civil District Court for the Parish of
Their Creditors. } Orleans.
Division "D."

[STAMPS] The petition of H. Kern & Son, a commercial firm recently doing business in this city, shows with respect:

That petitioners on the day of obtained from this Honorable Court a judgment granting them a respite, or extension of time, within which to pay their obligations. That the time for the payment of said obligations has arrived, and petitioners are unable to meet them. That petitioners have been unfortunate in business, having failed to realize upon many of their assets, were unable to continue their business and are insolvent, and it becomes necessary for them to make a surrender of their property for the benefit of their creditors.

Petitioners further show that for several days they have

been discussing with their attorneys the manner in which this surrender should be made, and were deliberating upon the same at the time the decree was obtained herein ordering a surrender.

That petitioners desire to make a voluntary surrender of all their assets, irrespective of any order of Court commanding them to do so.

Petitioners say that some of their creditors reside out of the State, and it is necessary that an attorney be appointed to represent them.

That it is necessary that a meeting of their creditors be convened at such time and place that the Court may direct, in order that petitioners might lay before them a statement of their affairs, and surrender to them their estate and obtain a discharge from their debts; to elect a syndic and decide upon the terms of the sale of the property. That they present herewith a full and correct schedule of their liabilities and their assets.

Wherefore, petitioners pray that a meeting of their creditors be convened, according to law, before Jos. N. Wolfson, Notary Public of this City, on the 30th day of December, 1892, in order that petitioners may lay before them a statement of their affairs, and to vote upon this, their application for a discharge, to vote for a syndic to decide upon the terms of the sale of this property, and upon all questions properly to be considered by them; and that meanwhile all proceedings against their person and property be stayed. That an attorney be appointed to represent the absent creditors; and for general relief, and for all needed orders in the premises.

(Signed) PERCY ROBERTS AND
BERNARD TITCHE,
Attys.

State of Louisiana, }
Parish of Orleans. }

I, Henry Kern, do solemnly swear that the above schedule contains a correct and faithful statement of all the property owned, or possessed by the firm of H. Kern & Son, or the property which I individually own or possess, either movable or immovable, or any other rights or claims,

except, however, those articles which the law authorizes me to keep. And I do further solemnly swear, that the schedules contain a correct and faithful statement of the active and passive debts of H. Kern & Son, or of myself, and of the losses which I and the firm of H. Kern & Son have experienced in their affairs, and that neither I, nor the firm of H. Kern & Son, has directly or indirectly diverted any of my or their property to the injury of my or their creditors. So help me God.

(Signed) H. KERN.

Sworn to and subscribed before me this 7th day of December, 1892.

[SEAL] (Signed) EDGAR M. CAHN,
Not. Pub.

State of Louisiana, }
Parish of Orleans. }

Henry Kern, being duly sworn, says that he and his son, Emile Kern, compose the firm of H. Kern & Son. That the said Emile Kern is now absent from the State. That to his personal knowledge the foregoing schedule contains a full and correct account of all the property, rights, or credits, of his said son, Emile Kern, and that he, the said Emile Kern, has neither directly nor indirectly diverted any of his property to the injury of his creditors.

(Signed) H. KERN.

Sworn to and subscribed to before me this 7th December, 1892. [SEAL] (Signed) EDGAR M. CAHN,
Not. Pub.

Let the cession of property of petitioners, the commercial firm of H. Kern & Son, and of the individual members thereof, be and the same is hereby accepted by the Court for the benefit of their creditors, and it is ordered that a Meeting of said creditors be convened and held before Joseph N. Wolfson, Esq., Notary Public, at his office, No. 6 Carondelet Street in this City, commencing on Thursday, the 30th day of December, 1892, at 11 O'Clock A. M., for the purpose of deliberating upon the affairs of said petitioners, electing a syndic, voting upon the application for a discharge, and upon all other matters that may be brought

before them, and in the meantime all judicial proceedings against their persons as well as their property be stayed, and let Horace L. Dufour, Esq., Attorney-at-law, be appointed to represent the absent creditors herein.

New Orleans, December 8th, 1892.

(Signed) N. H. RIGHTOR, *Judge.*

To the Honorable the Judges of the Civil District Court for the Parish of Orleans:

The petition of Henry Charnock, O. K. Krause & Company, and Mendel & Company, with due respect represents:

That they are creditors of H. Kern & Son in an aggregate amount exceeding Fifteen thousand dollars, and duly appear as such on the schedule of said H. Kern & Son. That the said H. Kern & Son have this day made a voluntary surrender of their assets to their creditors, and that your petitioners do now recommend and urge, as the provisional syndics under said assignment, Theodore C. Sachse, of the City of New Orleans, under such bond as may be fixed by the Court.

Petitioners finally pray for all such necessary orders in the premises, and for general and equitable relief.

(Signed) FARRAR & LEAKE,
Attorneys for petitioners.

As attorney for Silberberg Brothers, Jennings Lace Works, Jamison & Moss, L. S. Davidson & Son, Stawbridge & Clothier, Sharpless Brothers, I join above petition. (Signed) B. R. FORMAN, *Atty.*

Order.

Considering the within petition and the law in such cases made and provided, it is ordered that,

Theodore C. Sachse be, and he is hereby named and appointed Provisional Syndic of H. Kern & Son, and of the individual members of said firm, under their voluntary assignment this day made, and that letters to that effect issue to said Theodore C. Sachse, on his giving bond in the sum of Twenty Thousand Dollars, conditioned according to law.

N. O., December 9th, 1892.

(Signed) N. H. RIGHTOR, *Judge.*

H. KERN & SON,
Statement of
Assets
and
Liabilities.
December 1, 1892. Filed December 8, 1892.
(Signed) JAS. D. RANKIN, *Dy. Clerk.*

Assets.

J. T. Hampton	Notes	$ 331.94
A. G. DeLisle		24.87
Jos. Illif		25.00
Mr. Springbed		12.55
J. D. Adcock		33.72
Mr. Jett		4.00
M. Oldstein		16.14
O. H. Sleade		99.15
F. A. Guyol		13.12
Capt. Pippo		127.78
M. B. Brady		39.41
C. Kratteman		25.00
T. A. Coons & Co		74.83
C. Newman		188.50
Levy & Clark		266.25
M. Gernon		29.95
M. M. Whitney		74.94
C. Gauze		236.15
G. Lock		61.55
H. Liberman		332.65
L. Backhaus		84.20
J. B. Powell		7.18
F. Desdier		164.25
J. Goldsticker		65.25
J. T. Hampton		50.00
T. W. Bothick		5.35
Mrs. M. Hamilton		.48
Dr. Plough		1.02
V. Kerr		60.00
J. M. Wasserman		25.70
P. Venturini		44.73
C. A. Wagner		87.77

Mrs. Oberling	22.97
Henry Friedlander	16.25
F. B. Rittreux	4.62
Carried Forward	$2657.27
Brought Forward	$2657.27
Capt. Fred. Wright	28.15
J. M. Jordon	8.05
S. Turner	5.45
Scott, Hagan & Co	50.38
Mrs. M. E. Garvey	5.63
Mrs. Cronan	2.94
Mrs. Royal	7.40
Mrs. J. Brunet	2.83
Mrs. J. King	10.05
Mrs. C. M. Taylor	5.50
J. Judgson	4.50
Mrs. Lincoln	2.00
W. H. Ford	4.80
Mrs. Roig	9.34
J. J. Birmingham	10.23
Anna Casey	2.75
Mrs. M. Martinez	7.45
Mrs. L. Nicodemus	2.50
Miss Atken	7.00
Mrs. Ferran	19.20
Miss A. Leeds	27.85
V. E. Baumgarden	10.50
Mrs. Dallier	8.65
S. A. Poche	43.72
Mrs. Cenette	17.55
A. G. Whittington	22.15
J. R. Heggie	71.60
Sol. Felix	8.76
A. E. Schaefer	13.82
Mrs. Saltser	4.00
" Utell	10.60
" Reisland	4.60
L. C. Duncan	17.56
Carried forward	$3107.81

Brought forward	$3107.81
Geo. F. Starns	60.08
Mrs. Noble	3.00
John A. McCabe	39.34
A. Neifer	15.14
Mrs. Canepa	5.06
J. E. Johnson	32.90
T. E. Deeves	2.00
V. Dejan	19.45
Mrs. J. Powell	36.88
F. Klevorn & Son	25.80
N. Thigpen	28.19
Jas. Regan	129.80
A. A. Boyd	19.60
W. Elwany	11.35
Mrs. Shupan	12.90
M. Graham	4.90
W. H. Noble	6.10
Mrs. Brown	9.00
A. W. Warner	8.35
H. Boetner	6.90
B. Moriarty	19.00
J. H. Behan	23.75
Mrs. Kennedy	14.08
R. M. White	72.84
Mrs. A. L. Hester	3.84
W. M. Ratcliffe	13.48
E. B. Wimberly	11.20
H. B. Walmsley	31.85
M. R. Smith	47.90
G. Wunder	30.58
J. Fredericks	57.58
L. J. Witte	24.80
John McCree	35.70
J. J. McFarland	29.83
P. A. Murray	7.89
E. D. Thieneman	3.35
J. McCaffery	9.30
Carried forward	$4021.62
Brought forward	$4021.62

E. Holt	15.80
A. Dumestre	49.25
Mrs. Glower	17.75
Evans Bros	2.20
W. H. Waters	15.45
Geo. C. Briley	11.25
Jean Marie	5.60
J. F. Yeend	10.85
Mrs. Barr	10.70
L. H. Champlin	7.47
A. Runkel	7.90
J. B. Budd	3.68
B. W. Taylor	152.47
T. H. Watson	3.77
Davis Legras	32.98
E. Fulton	23.05
C. F. Stott	6.05
H. Tebbe	5.64
E. Mauras	68.15
Miss Thurber	3.97
Lottie Fisher	18.80
Mrs. Fletterman	5.25
Miss. Valley R. R	15.92
S. G. Bennett	12.76
I. Busha	12.57
Albert Smith	34.88
Mrs. M. A. Field	40.60
Mrs. Jordan	11.00
Mrs. Murphy	11.25
J. A. Burbank	18.75
Mrs. Ducre	8.00
C. Sundmacher	56.49
Theo. Peterson	3.25
Carried forward	$4730.64
Brought forward	$4730.64
Chas. L. Lea	7.70
W. T. Jones	4.41
E. Massicot	11.98
J. G. Munroe	115.79
D. J. Wire	5.13

S. P. Gagnet	129.36
M. Gradwohl	8.80
Miss Jillette	10.00
Henry Pohlmann	8.50
C. Borey	8.70
Mrs. Brown	36.01
Emma Whittington	25.48
Theresa Jones	24.97
James Lindsey	9.75
Tom Brady	20.00
Mrs. J. Kuhner	10.66
David Jones	10.00
Miss K. Cain	5.50
H. Schlemp	10.93
W. J. King	6.25
E. W. Condon	27.25
P. Forstall	5.15
J. Schlessinger	5.15
M E. Daley	3.55
Geo. D. May	16.08
Miss Preston	10.00
B. J. Flynn	9.55
Geo. A. Hartley	4.75
T. J. Johnson	30.09
T. Sefkes	6.25
Ida Martell	44.57
M. E. Bamerman	22.25
F. T. Copp	10.00
	$5395.20

Assets.

The sum of Twenty-five thousand and two dollars ($25,002), being balance of the sale of stock of goods, fixtures, etc., contained in the premises at the corner of Dauphine and Canal Streets in this city, which belonged to your petitioners, and which, on the 20th day of February, 1892, was sold by them to A. Schwartz & Sons for the sum of Forty-Seven Thousand Dollars ($47,000).

Of the said balance, the sum of Eighteen Thousand Five Hundred Dollars ($18,500) is now in the custody and under the control of certain custodians selected by my former at-

torney, Felix J. Dreyfous, Esq., and W. S. Benedict, Esq., the attorney of A. Schwartz & Sons, and which said sum of Eighteen Thousand Five Hundred Dollars ($18,500),—held by them as trustees under an agreement made between petitioners and the said A. Schwartz & Sons, some time after the sale of the said goods, to await the result of a certain seizure and garnishment proceeding in the suit of the H. B. Claflin Company against your petitioners, instituted in the United States Circuit Court and entitled the H. B. Claflin Company vs. H. Kern & Son, being No. 12,069 of the docket of said Court.

And the further sum of Seven Thousand and Two Dollars ($7002) of the said balance is in the hands of said A. Schwartz & Sons, having been garnisheed and seized under said writ of attachment by the said H. B. Claflin Company in the said suit.

The said attachment issued in the said case, and the said seizure and garnishment under said attachment, being dissolved, discharged, and now fallen, in consequence of petitioner's cession, under the insolvent laws of this State, the said balance of $25,002, in the custody of said trustees, being thereby released from the effect of said agreement made by petitioners with said A. Schwartz & Sons, they hereby surrender the same for the benefit of all their creditors.

Liabilities.

Siegfried & Brandenstein	Note	July 18-'91	$1174.80
" " "	"	Aug. 11-'91	350.30
" " "	"	Aug. 25-'91	607.14
Wilmerding, Morris & Mitchell,	"	Aug. 5-'91	539.25
Field, Chapman & Fenner	"	July 27-'91	830.13
" " "	"	July 21-'91	945.70
Ottenheimer Bros	"	Aug. 11-'91	396.56
" "	"	Sept. 10-'91	398.52
Seigel Bros	"	Aug. 15-'91	1054.97
H. B. Claflin Co	"	Mch. 13.'92	2350.69
" " "	"	May 13-'92	2350.69
" " "	"	Sept. 13-'92	2350.69
" " "	"	Sept. 13-'92	2350.69
" " "	"	Mch. 13-'93	2350.69

Sherman, Cecilt & Co.	Note	Mch. 13-'92	86.06
" " "	"	Sept. 13-'92	86.06
" " "	"	Mch. 13-'93	86.07
Rothschild Bros. & Co	"	Mch. 13-'92	47.27
" " "	"	Sept. 13-'92	47.27
" " "	"	Mch. 13-'93	47.27
Jos. Loth & Co	"	Mch. 13-'92	42.25
" "	"	Sept. 13-'92	42.25
" "	"	Mch. 13-'93	42.25
J. B. Locke & Potts	"	Mch. 13-'92	125.94
" " "	"	Sept. 13-'92	125.94
" " "	"	Mch. 13-'93	125.95
Hirsch & Bro.	"	Mch. 13-'92	205.85
" " "	"	Sept. 13-'92	205.85
" " "	"	Mch. 13-'93	205.85
Pelgram & Meyer	"	Mch. 13-'92	148.68
" " "	"	Sept. 13-'92	148.68
" " "	"	Mch. 13-'93	148.67
Goldenberg, Bros. & Co.	"	Mch. 13-'92	36.45
" " "	"	Sept. 13-'92	36.46
" " "	"	Mch. 13-'93	36.45
Arnold B. Heine & Co.	"	Mch. 13-'92	158.74
" "	"	Sept. 13-'92	158.74
" "	"	Mch. 13-'93	158-74
Lord & Taylor	"	Mch. 13-'92	142.39
" " "	"	Sept. 13-'92	142.39
" " "	"	Mch. 13-'93	142.40
Garner & Co.	"	Mch. 13-'92	119.53
" " "	"	Sept. 13-'92	119.53
" " "	"	Mch. 13-'93	119.53
J. K. Wilson & Co.	"	Mch. 13-'92	91.14
" "	"	Sept. 13-'92	91.14
" "	"	Mch. 13-'92	91.15
L. N. Asiel & Co	"	Mch. 13-'92	163.06
" "	"	Sept. 13-'92	163.06
" "	"	Mch. 13-'93	163.05
W. L. Rock Mills	"	Mch. 13-'92	123.45
" "	"	Sept. 13-'92	123.46
" "	"	Mch. 13-'93	123.46
Muser Bros.	"	Mch. 13-'92	889.32

Muser Bros.	Note	Sept. 13-'92	889.33
"	"	Mch. 13-'93	889.33
W. G. Hitchcock & Co.	"	Mch. 13-'92	117.22
" " "	"	Sept. 13-'92	117.22
" " "	"	Mch. 13-'93	117.22
A. Rappard & Co.	"	Mch. 13-'92	68.10
" "	"	Sept. 13-'92	68.11
" "	"	Mch. 13-'93	68.11
Wm. Openheim & Sons	"	Mch. 13-'92	46.61
" "	"	Sept. 13-'92	46.61
" "	"	Mch. 13-'93	46.62
Acheson, Harden & Co.	"	Mch. 13-'92	49.72
" " "	"	Sept. 13-'92	49.72
" " "	"	Mch. 13-'93	49.72
			$26036.25
Jennings' Lace Works	"	Mch. 13-'92	64.58
" "	"	Sept. 13-'92	64.59
" "	"	Mch. 13-'93	64.58
E. Scheitlin & Co.	"	Mch. 13-'93	370.83
" "	"	Sept. 13-'92	370.84
" "	"	Mch. 13-'93	370.84
R. & H. Adams	"	Mch. 13-'92	59.54
" "	"	Sept. 13-'92	59.54
" "	"	Mch. 13-'93	59.56
Lawrence, Taylor & Co.	"	Mch. 13-'92	227.68
" "	"	Sept. 13-'92	227.68
" "	"	Mch. 13-'93	227.68
Dieckerhoff, Raffloer & Co.	"	Mch. 13-'92	47.22
" "	"	Sept. 13-'92	47.23
" "	"	Mch. 13-'93	47.23
Hoenmghaus & Curtiss	"	Mch. 13-'92	55.88
" "	"	Sept. 13-'92	55.89
" "	"	Mch. 13-'93	55.89
Mills & Gibb	"	Mch. 13-'92	46.63
" "	"	Sept. 13-'92	46.63
" "	"	Mch. 13-'93	46.64
F. J. Kloes Mf'g Co.	"	Mch. 13-'92	65.49
" " "	"	Sept. 13-'92	65.49
" " "	"	Mch. 13-'93(note)	65.49
Hadden & Co.	"	Mch. 13-'92	105.53

Hadden & Co.	Note	Sept. 13-'92	105.53
" "	"	Mch. 13-'93	105.54
Neuberger, Heine & Co	"	Mch. 13-'92	67.29
" "	"	Sept. 13-'92	67.29
" "	"	Mch. 13-'93	67.29
Langdon, Batcheler & Co	"	Mch. 13-'92	85.65
" "	"	Sept. 13-'92	85.65
" "	"	Mch. 13-'93	85.65
R. J. Roberts	"	Mch. 13-'92	42.92
" "	"	Sept. 13.'92	42.93
" "	"	Mch. 13-'93	42.93
			$29754.10
H. B. Claflin Co	"	July 23-'92	1101.23
" "	"	Mch. 18-'92	1141.22
" "	"	Jany. 29-'92	1646.00
" "	"	Feb. 15-'92	1647.00
" "	"	Feb. 29-'92	2647.98
" "	"	Apl. 6-'92	811.06
H. B. Claflin Co	"	Aug. 9-'92	764.70
" "	"	May 14-'92	1783.36
" "	"	Sept. 24-'92	1622.39
Strawbridge & Clothier	"	Mch. 13-'92	145.07
" "	"	Sept. 13-'92	145.07
" "	"	Mch. 13-'93	145.08
Mendell & Co.	"	Apl. 24-'92	121.21
" "	"	July 24-'92	121.21
H. B. Claflin Co.			594.19
Klemm, Harriman & Co			603.51
Muser Bros.			66.82
Ivins, Dietz & Masee			180.74
York St. Flax Spinning Co.			40.20
H. L. Judd & Co.			42.43
Burton Bros. & Co			95.45
Jno. Crossley & Sons			132.50
Sylvester, Bell & Co.			178.59
P. K. Wilson & Co.			437.21
Mayer, Strouse & Co.			85.00
G. Sidenberg & Co			238.39
Jos. Becker & Co.			267.25
Langdon, Batcheller & Co.			132.54

Lewis, Schiele & Co		223.63
J. R. Simon & Co		49.43
Amasa, Lyon & Co		.75
Passavant & Co		141.69
Sharpless Bros	paid 1-3	108.83
		$47215.83
R. H. White & Co		321.89
G. & J. Ballin		43.20
E. S. Jaffray & Co		1663.91
Jos. Loth & Co		200.93
Hoeninghaus & Curtiss		126.66
E. S. Jaffray & Co		379.66
Cohen Bros. & Co		90.60
Jay C. Wemple Co		334.64
Stewart Hartshorn		139.00
J. B. Kleinert		162.75
A. Steinhart & Bro		44.90
L. N. Aisiel & Co		195.58
Verden & Schultz		4.00
Joffe & Pincus		27.50
Werner, Itschner & Co		16.00
Silberberg Bros		66.00
Japanese Fan Co		54.72
Hy. M. Peitser & Co		134.25
W. G. Hitchcock & Co		247.40
Goldenberg Bros. & Co		53.52
Calhoun, Robbinst & Co		18.90
R. & A. Adams & Co		82.81
Potschild Bros & Co		63.75
Parker, Wilder & Co		71.50
Heiht Bros		38.75
A. Rappard & Co		376.39
William Reiss		19.50
D. S. Walton & Co		77.76
Bliss, Fabyan & Co		275.99
Japanese Fan Co		58.75
Remef, Schmidt & Pleisner		57.50
N. Hecht		160.87
Levy Bros. & Blum		47.23

M. Hauser	34.00
P. W. Lambert & Co	9.90
Wm. Trevort & Co	40.54
William Robertson	119.30
	$53076.36
Kursh & Wobrstem	45.00
Schutz Bros. & Blath	38.00
C. L. Wordbridge & Co.	38.10
Oppenheim, Collins & Co	44.75
Gutman Bros	69.48
Siegfried & Brandenstein	471.20
Corticello Spool Silk Co.	126.80
T. Rothschild	88.51
Einstein, Wolf & Co	15.64
G. E. Leltmacher & Co	55.38
Maas, Blum & Co	28.50
Eugene O'Reilly	6.57
American Plush Ball Co	9.16
Frank B. Hobart & Co	29.40
Clasp Envelope Co	10.00
Star & Crescent Mills Co.	86.72
Chs. F. Pease	15.75
Jas. McCutcheon & Co	7.50
L. A. Strobel & Co	56.16
Chs. Beranstein & Co	45.00
Smith & Angell	.75
Cordner & Williamson	125.00
Abegg & Rusch	222.99
O. H. Hayes & Co	138.32
Cohen, Endell & Co.	131.43
Calographic Windsor Shade Co.	389.75
Schutz Bros. & Blath	372.50
Coats Thread Co	203.04
O. K. Krause & Co	127.80
Prilip Brody & Co	14.20
W. F. Brown Company	48.00
Arlington Skirt Mfg. Co	50.50
M. W. Lipper & Co	7.00
Wm. Huey	27.00

McCallum Constable Hosiery Co				79.17
				$58301.43
Hy. Charnock	Note		July 16-19	1050.20
" "	"		Aug. 8-11	905.23
" "	"		Oct. 1-4	529.80
" "	"		Nov. 1-4	755.70
" "	"		Dec. 0-3	654.26
Fellman & Grumbach	"	Balance	Sept. 6-9	1750.00
" "	"		Feby. 23-26-92	5000.00
J. Goldsticker	"	Balance	Oct. 28-31	2000.00
"	"		Dec. 14-17	3100.00
A. Lehman & Co	Note	Balance on Notes		982.04
Nicolson & Co	Note		July 27-30	450.00
Nicholson & Co	Note		Aug. 26-29	458.84
Union Natl. Bank	"		July 28-31	2250.00
" " "	"		Aug. 20-23	2150.00
" " "	"		Sept. 13-16	3150.00
" " "	"		Sept. 18, Oct. 1st	2150.00
Eagle & Phœnix Mfg. Co				67.50
Katz & Barnett				150.22
Fellman Bros				1400.00
B. Fellman				2000.00
Levy, Loeb & Co				155.40
Maginnis Cot. Mills				303.60
Vincent & Co				78.17
Richardson, Williams & Co				11.24
Hy. Charnock				2884.16
M. Gonsenheim				872.86
C. Lazard & Co				6.75
A. Lehman & Co				403.93
Fellman & Grumbach				1588.99
B. Fellman				2085.52
Jos. Bowling Co. Lim				105.25
				$95751.29
L. Fellman & Co				1547.91
L. S. Davidson & Co				377.50
R. Smeaton				78.16
E. Offner				23.09
R. Maitre				.75

C. F. Schumacher	9.50
Alex. McConnell	13.10
W. B. Leonard	5.00
E. Chexnaydre	1.50
W. E. Seebold	1.65
A. B. Griswold	5.00
L. Luderbach	6.00
L. Lamothe	11.75
Geo. Boning	6.89
Nicholson & Co	327.82
Daily States	3.50
A. Betat	2.00
D. Mercier's Sons	38.25
L. Goldstein & Sons	30.25
Chs. Lob's Sons	7.80
A. Runkel	36.15
Southern Drug Co	21.75
J. C. Muller	.50
Heath, Schwartz & Co	2.50
Levy & Isaacs	17.00
F. D. Ruth	2.39
Muir & Fromhertz	62.07
B. J. Flynne	17.00
J. F. Braun	14.00
Boylan's Police	40.00
A. W. Hyatt	40.85
G. Pitard & Bro	1.30
J. T. Gibbons	140.96
	$98645.09
	$98645.09
R. G. Dun & Co	50.00
Wm. M. Railey	194.75
Julius Meyer	11.26
J. Q. Zatarain	4.08
W. J. Kane	4.00
Morris McGraw	5.70
Jno. C. Davey	3.50
Edison Electric Light Co	33.87
Louisiana Excavating Co	10.00
F. Brinker & Co	9.50

Home Insurance Co	22.50
Nickle Plate Shoe Store	6.50
Lehman, Stern & Co	107.50
D. H. Holmes	8.75
Mrs. A. Tesson	2.75
Pattison & May	33.41
R. F. Pescud	82.64
W. E. Rau	11.50
	$99247.30
Note :—C. Cain Detective Agency, About	245.00
Costs paid and to be paid in this cession, say	100.00

Petitioners reserve the right to file a supplemental schedule should any error or omission herein be discovered by them.

A true copy :

New Orleans, Jany. 19th, 1893.

[SEAL] GEO. W. PRADOS, *dy. Clk.*

U. S. Circuit Court.

No. 12,059. H. B. Claflin Co. vs. H. Kern & Son.

Admission Dec. 10, 1892.

'Tis admitted by all parties that the proceedings in the above entitled cause, begun by a respite, the record of which can not be found, and that the respite proceedings did not carry with them the hypothecation of the property, and that the debtors did not surrender their property.

Notice to A. Schwartz & Son from Wynne Rogers, Atty. for Provisional Syndic. Offered by Shwartz & Sons and filed Dec. 10th, 1892.

New Orleans, Dec. 6th, 1892.

A. Schwartz & Son :

This is to notify you that Victor Mauberret, Civil Sheriff of the Parish of Orleans, has been by virtue of an order of the Judge of Div. D. of the Civil Dist. Court been appointed Provisional Syndic of the Creditors of H. Kern & Son and of Henry Kern and Emile Kern, Insolvents, on the 30th day of November, 1892, and that he has notified said Insolvents to turn over to him in that capacity all of the assets and property that they may possess of whatever nature and

kind. You are hereby notified not to pay over to or part with to any person whatsoever, of any money, notes, bills or any other property that may be owing by you to said Insolvents, or be held by you for their account.

Very truly yours,
(Signed) WYNNE ROGERS,
Atty. for Sheriff, Prov. Syndic, etc.

Order—Continuance of Motion for New Trial by Defendants.

Extract from the Minutes of Dec. 10th, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son. } No. 12,059.

This cause came on this day to be heard upon the motion for a new trial filed by defendants, and upon the motion to set aside the attachment.

Lazarus, Moore & Lemle appearing for plaintiffs in suit,
Percy Roberts and B. Titche for defendants,
W. W. Howe & W. S. Benedict for A. Schwartz & Sons,
Wynne Rogers for V. Mauberret,

when after hearing *hearing* evidence and arguments in part from the counsel for the respective parties, the Court ordered the cause to be continued to Monday, December 12, 1892.

Submission of Motions as to New Trial and Dissolution of Attachment.

Extract from the Minutes of Dec. 12, 1892.

H. B. Claflin Co. *vs.* H. Kern & Son. } No. 12,059.

This cause came on this day to be further heard upon the motion of defendants for a new trial and also on the motions to set aside the attachment, and counsel for all parties being present, was proceeded with. After hearing further argument from counsel the Court took the matter under advisement.

Motion of A. Schwartz & Sons, garnishees, as to recognition of Dissolution of Attachment, etc. Filed Dec. 12, 1892.

U. S. Circuit Court.

H. B. Claflin Co., L'd, } No. 12,059.
vs.
H. Kern & Son.

And now come A. Schwartz & Sons, made garnishees herein, and referring to their motions of Dec. 6 and Dec. 10, 1892, and the facts set forth therein, and proof thereon, make the same motion thereon as garnishees in this cause, and reserving all rights as such, show to the court that the attachment herein has been "stayed and practically dissolved" by said proceedings in the Insolvency of H. Kern & Son, defendants herein, No. 33,424, Civil District Court, Parish of Orleans; and they ask that such stay and dissolution be recognized and enforced by proper order in this cause. (Signed) W. W. HOWE,
W. S. BENEDICT,
For A. Schwartz & Son.

Opinion on Motions for New Trial and Dissolving Attachment.
Filed Dec. 17th, 1892.

Circuit Court of the United States,
Eastern District of Louisiana.

The H. B. Claflin Co. } No. 12,059.
vs.
H. Kern & Son.

Appearances:
Lazarus, Moore & Lemle for Plaintiffs.
Bernard Titche for Defendants.
W. S. Benedict & W. W. Howe for A. Schwartz & Sons for Intervenors.
Wynne Rogers for V. Mauberret.

The defendants in this cause had obtained a Respite under the laws of the State of Louisiana for the periods of six, twelve, and eighteen months. This action, for an amount due and to become due, was brought; and upon filing the petition, Feb. 22nd | 92, a writ of attachment against the property of the defendants was obtained.

Previous to the attachment the defendants had attempted to sell, and claimed they did sell, to Shwartz and Sons a large portion of their goods, and the attachments was levied both upon the goods claimed to have been bought by Shwartz and Sons, and, through the garnishee process, upon

them as debtors of the defendants; Shwartz and Sons answered the garnishment process, admitting that they owed to the defendants $7002.

It was further admitted by the defendants and Shwartz and Sons, that a certain portion of the price of the goods purchased by them was deposited in the hands of their Counsel, and held to indemnify Shwartz and Sons in case the sale should be held to be invalid. Shwartz and Sons intervened in the cause, and claimed the goods attached as owners under the purchase above referred to, and had the goods restored to them on a bond, under acts of 1876, No. 51.

A motion had been made to dissolve the attachment, on the ground of the falsity of the allegations, under C. P., article 258. The trial was before a jury. There was a verdict maintaining the attachment. A motion for a new trial, which had been held under advisement at the inception of the trial of this application, was refused.

Upon the 6th day of December, 1892, the cause of H. B. Claflin Co. vs. H. Kern & Son was tried. The contest at this trial was as to the continuance or dissolution of the attachment, by reason of the respite proceedings having been, as was claimed, turned into those of involuntary bankruptcy.

Upon the trial of this cause in support of the dissolution of the attachment there appeared as attorney, Mr. Wynne Rogers for Victor Mauberret, who offered in evidence an order of the Civil District Court for the Parish of Orleans appointing Victor Mauberret provisional Syndic of the Estate of the defendants, on the ground that they had failed to comply with the terms of their respite, as also the petition of creditors who provoked that order (this order is attached hereto, as well as his letters of appointment as syndic).

Mr. W. S. Benedict and Mr. W. W. Howe also appeared for Shwartz and Sons, intervenors, and urged the same matters as did the attorney for the provisional syndic.

Mr. Bernard Titche also appeared for the defendants, and urged the same matters.

The plaintiffs objected to the appearance on this trial of the intervenors and the defendants for the purpose of urging

the insolvency of defendants on the following grounds, viz: as to the former, the want of interest, and, as to the latter, incapacity to urge the effect of their own civil death.

The court ordered the cause to proceed, and directed that the objections of all parties to the attachment, as well as the objections to the appearance of any of the parties above named, should be heard on the application for a new trial, and the trial of the cause proceeded, and resulted, under the direction of the Court, in a verdict for the plaintiffs, with the privilege of the attachment.

The motion for a new trial was heard on the 10th day of December, 1892, all the parties above mentioned being present by their attorneys. Besides the testimony offered at the trial, the plaintiffs offered an order of the Civil District Court purporting to revoke the appointment of Mauberret as Syndic, a copy of which order is hereto annexed, as also that part of the transcript of the record of the case of Kern & Son in that Court, which relates to the amount deposited in the hands of certain parties as an indemnity to Shwartz and Sons in case the sale of the goods to them should be adjudged to be invalid.

The intervenors offered the whole of that transcript, a copy of which transcript, including the portion offered by the plaintiff, is hereto annexed. (See pp. 58 to 76 of this transcript).

This transcript gives the proceedings in the Court with reference to the voluntary surrender of the defendants to the Court of Insolvency on the 8th day of December, 1892, showing the defendant's voluntary surrender and the acceptance of the same by the Court.

The plaintiffs renewed their objections as to the right of the intervenors, and the defendants to appear in this matter and further objected to the right of Mauberret to appear as Syndic on account of the order revoking and setting aside his appointment.

I will first proceed to the consideration of the objections to the appearance of the parties for the purpose of urging the insolvency of the defendants.

I think that as to the defendants the objection is well taken and it is maintained.

As to the intervenors the objection is not well taken, be-

cause they are parties to the cause and have an interest in the dissolution of the attachment sufficient to make them parties to the litigation of this question.

As to the provisional syndic, I do not find it necessary or proper to determine who shall be held to be the provisional syndic. That is a question for the insolvency Court and the Supreme Court. Two considerations lead me to allow the appearance of and testimony offered by the syndic to have their effect. In the first place, Mr. Mauberret was beyond all question the provisional syndic when he appeared and offered the testimony. If he has since been removed, that does not destroy the effect of that appearance and testimony. Secondly, since I have come to the conclusion that the attachment should be dissolved, provided the decree provides that the property of the insolvents shall be delivered to whoever satisfies the Court by competent evidence that he is syndic when he comes to actually receive the property of the defendants which had been attached, no injustice can be done by proceeding to dispose of this motion.

My conclusion therefore is, that with the intervenors present, who are competent to litigate the matters involved and with a syndic who was competent, at least at the time of the trial, I ought to hold and therefore I do hold, that I have had the proper parties before me to allow the adjudication as to the effect of the claimed insolvency upon the attachment. If the showing is such that the Court is satisfied of the insolvency, a judicial declaration of such a conclusion is like the action of the Courts in consequence of the death of a party in which case it may receive and act upon the suggestion of the death from any person if he be connected, no matter how remotely, with the cause.

As to the questions upon the merits.

The principal question is this—Where a suit is commenced in connection with an attachment and before judgment, the defendants are declared to be involuntary insolvents under the insolvent laws of the State of Louisiana, what becomes of the attachment?

In Tua vs. Carriere, 117 U. S. R. page 201, and in Lafollye vs. Carriere, 24 Fed. R. page 346, it was held that *cessio bonorum*, in case of voluntary insolvency in Louisiana,

dissolve the attachment in a cause pending in the U. S. Court. In Geilinger vs. Philippi, 133 U. S. R. page 246, this doctrine is reiterated.

The ground or reason of these decisions is that whenever attachments become inoperative in the State Court by reason of the State laws, they should be dissolved in the Courts of the United States by virtue of the U. S. Revised Statutes, article 933.

It is not necessary to consider the effect of the voluntary surrender. Without that the case stands thus: the defendants had obtained a Respite, and having failed to comply with its terms had been adjudged insolvents in forced proceedings.

Article 3098 enacts that when the creditors refuse a respite, a cession of property ensues and the proceedings continue as if the cession had been offered in the first instance.

In this case there had been a respite. The debtors had failed to comply with its terms. Upon a rule upon them the proceedings were turned into those of forced insolvency, a provisional syndic had been appointed and a stay of proceedings on the part of the individual creditors granted. (I am omitting purposely the controverted proceedings in the insolvency Court and all those which were had subsequent to the trial).

After such proceedings, or indeed after any proceedings in insolvency in Louisiana, whereby a stay is granted against the individual creditors, they cannot, in the Courts of the State proceed to judgment, but their suits are cumulated with the proceedings in the insolvency Court. All their proceedings thereafter must be carried on in that Court contradictorily with all the creditors. "Hennen's Digest, vol. 1, page 687, 688, Title Insolvency, IV (b). In the insolvency Court after such consolidation the individual creditor with an attachment whose suit has, before judgment, been interrupted by the insolvency proceedings, has no more privilege in the distribution than if he had never had an attachment. This State law, of course, of its own force and vigor, could affect only attachments pending in the State Courts, but the act of Congress, section 933, revised statutes, provides: "An attachment of prop-

erty upon process instituted in any court of the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the laws of the State where said court is held, such attachment would be dissolved upon like process instituted in the courts of said State: Provided, That nothing herein contained shall interfere with any priority of the U. S. in the payment of debts."

It is to be observed that when the statute is technically considered it applies only to attachments which by the happening of any contingency are dissolved. But if we go back to the original statute from which section 933 was codified or compiled (act of 1848, 9 vol. page 213), we see that Congress declared that it was the intent and meaning of that provision "to place such attachments in the courts of the States and the United States upon the same footing."

This declaration as to what Congress intended or meant has the same effect upon the interpretation of the revised statute as upon the original, and requires that the word dissolve should be interpreted to mean "finally suspended," "prevented from being perfected into an enforcible lien or privilege," "rendered ineffectual as a means of adding to the attaching creditors' rights in the collection of the debt."

But it is urged, on the part of the plaintiff, there is no provision of the Louisiana law which dissolved the attachment and destroys the lien; that the obstacle to the attachment in the State Court is, that the suit of the attaching creditor is stayed and he has an attachment, but he is simply prevented from enforcing it, and that there is no such obstacle in the U. S. Courts, by reason of their being established under a distinct sovereignty, and that here the creditor, having no such impediment, can proceed and make his inchoate or conditional lien or privilege absolute. The answer to this is the statute. By its declared intent the creditor, with an attachment in the U. S. Court, must be put on the same footing with the creditor with an attachment in the Courts of the State. In these last the creditor's attachment is perpetually stayed. It follows, that somehow, in the Courts of the U. S., it must be also rendered

inoperative, and since the creditor here may proceed to judgment, in order to prevent the inequality which the object of the statute was to prevent, he must proceed here with the attachment dissolved. In other words, it is only by dissolving the attachment in this Court, that the equality of rights of the creditors can be preserved.

Some of these proceedings in the Insolvency Court occurred after the rendering of the verdict, though, of course, before the signing of the judgment, for it has not yet been signed.

This is a judgment in an action at law, and, therefore, under the existing practice act of Congress, it has the qualities of a final judgment, substantially according to the laws and practice of the highest Courts of the State. In the Courts of the State a judgment, so far as concerns the continuance of an attachment, is not an effective judgment till it is signed. Shaumburg vs. Torrey, 10 M. 178; Clark vs. Oddie, 4 N. S. 625.

If the barrier arises through insolvency before it is signed, it cannot afterwards be signed and its rendition is ineffective to make it carry a privilege. Authorities.

This must be the law with reference to a law-judgment in this Court.

It was also urged that by reason of the action of the plaintiffs in levying upon the property attempted to be sold to the interveniors, they stood in the attitude, and with the rights of creditors who had filed a Bill to recover property fraudulently conveyed, and therefore had equities as between themselves and the other creditors in connection with the attachment, which ought to be considered in connection with this question of dissolution. The answer to this is, that this a question as to whether an attachment stands or falls by reason of insolvency proceedings; that it must stand or fall in its entirety, and that the consequences of a dissolution in a particular case cannot be weighed against the clear mandate of the statute.

My opinion, therefore, is that a new trial must be granted, and that upon the filing of a certified copy of a final order appointing a syndic, and his paying the costs of the attachment up to the time of the insolvency, that the attachment must be dissolved.

Letters of Appointment of Victor Mauberret as Syndic. Annexed to Opinion of Court. See page 74 of this Transcript.

Order of the Civil District Court revoking appointment of Victor Mauberret as Provisional Syndic. Annexed to Opinion of Court. Copied at page 84 of this Transcript.

Part of Transcript of record in case of Kern & Son in Civil District Court relative to amount deposited in hands of certain parties as an indemnity to Shwartz & Sons, etc. Annexed to Opinion of Court. See pages 98 and 99 of this Transcript.

Transcript of Proceedings *in re* Cession of Property of H. Kern & Son, in Civil District Court. Annexed to Opinion of Court. See pages 57 to 77 of this Transcript.

Plaintiff's Bill of Exceptions. Filed Dec. 24.

The H. B. Claflin Co. } No. 12,059.
vs. } U. S. Circuit Court, for the Fifth Circuit and Eastern Dist. of La.
H. Kern & Son. }

Be it remembered, that when the above numbered and entitled cause was, on the 6th day of December, 1892, under previous fixing thereof, under the rules of this honorable Court, called for trial, and the plaintiff in said cause announced to the Court its readiness to proceed with the trial of the said cause, that then and there, A. Schwartz & Sons, intervenors herein, by and through their counsel, then and there objected to the trial of the said cause, on the ground that, prior to said date, in a proceeding pending in the State Court, entitled H. Kern & Son vs. Their Creditors, No. —— on the docket of said Court, a rule was therein taken, for and on behalf of the creditors named in said rule, the said rule being against H. Kern & Son, they being called upon to show cause, under said rule, why they should not, in accordance with the statute of the State of Louisiana in such case made and provided, make a surrender of their property to their creditors, for their failure to comply and carry out the conditions and terms of their respite; the occurrences which took place as well as the offerings of

evidence on the part of the various parties being stated in the opinion of the Court filed herein, which is made a part of this Bill of Exceptions.

That the Court thereupon, in said cause, ordered them, on the day then and there fixed, to answer said rule, and that, in and by virtue of the law in such case made and provided, the Court did, for and on behalf of the movers of said rule, name, nominate and appoint one Victor Mauberret as provisional syndic; the said A. Schwartz & Son, through their counsel as aforesaid, having attracted the Court's attention to the proceeding hereinbefore recited, prayed leave of the Court to file the within paper, in order that they might urge that the attachment previously obtained in such cause had, by the operation of the insolvent laws of the state, been dissolved and set aside.

That thereupon, plaintiffs herein objected to the appearance and intervention, in this respect, of the said A. Schwartz & Sons, they being without interest to attack or question the attachment obtained, maintained and relied upon by plaintiff, on the ground that none other than the syndic could raise the objection, and that there had been no surrender of their property by H. Kern & Son, nor was there any order of the Court staying process against either the person or property of H. Kern & Son.

That the Court overruled the objection, to which plaintiff then and there excepted, and took this their bill of exceptions, which, after having been submitted to counsel representing A. Schwartz & Son, the same is now tendered to this honorable Court for its signature, which Bill of Exceptions is allowed.

Dec. 24, 1892.

(Signed) EDWARD C. BILLINGS, *Judge*.

Opinion of Court filed Dec. 17, 1892, copied at Pages 80-88 of Transcript. Made part of Plaintiff's Bill of Exceptions.

Continuance.

Extract from the Minutes of Dec. 26, 1892.

H. B. Claflin Co. vs. H. Kern & Son. } No. 12,059.

By agreement of counsel for the parties, this cause is continued to January 4, 1893, at 11 A. M.

Judgment—New Trial granted.

Extract from the Minutes of Dec. 28, 1892.

The H. B. Claflin Co. vs. H. Kern & Son. } No. 12,059.

On the application of H. Kern & Son for a New Trial, and The Petition of Victor Mauberret, Provisional Syndic, and A. Shwartz & Sons, Intervenors, to vacate the attachment.

For the reasons assigned in the written opinion of the Court, on file, and to be considered part of the judgment herein:

It is ordered, adjudged, and decreed, that the verdict of the Jury, and the judgment rendered thereon, be vacated, annulled, and set aside; and that a new trial be granted herein.

Hearing and Continuance.

Extract from the Minutes of Jany. 4, 1893.

H. B. Claflin Co. vs. H. Kern & Son. No. 12,059.

This cause being called for trial this day, counsel for intervenors, A. Schwartz & Sons, and for the defendants, applied for a continuance and thereupon plaintiffs objecting, the Court after hearing counsel for the parties directed that the case be continued to Monday, January 9, 1893, at 11 a. m.

Motion of A. Schwartz & Sons, garnishees, and suggestion as to previous motion for setting aside Attachment. Filed January 9, 1893.

The H. B. Claflin Co. vs. H. Kern & Son. } U. S. Circuit Court. No. 12,059.

And now come A. Schwartz & Son, Intervenors and garnishees herein, and before entering on the trial of the intervention respectfully suggest their motions heretofore made to set aside the attachment in this cause and the testimony given on said motions and the opinion and

decision rendered thereon by this Hon. Court, and ask that the order to set aside the attachment be now entered on the minutes.

Hearing and Continuance.

Extract from the Minutes of January 9, 1893.

H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.
A. Schwartz & Sons, Intervenors.

This cause was called for trial.

Lazarus, Moore & Lemle appearing for plaintiff,

Percy Roberts & Bernard Titche for H. Kern & Son, defendants,

W. S. Benedict and W. W. Howe for A. Shwartz & Sons, intervenors,

Wynne Rogers for V. Mauberret,

whereupon the parties filed a stipulation waiving trial by jury.

After hearing arguments from the counsel for the respective parties, as to certain questions of law, the cause was continued until to-morrow at 1 P. M.

Waiver of Jury. Filed Jany. 10, 1883.

U. S. Circuit Court,
Eastern District of Louisiana.

H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

It is agreed that a trial by jury in this cause, of the main case between plaintiff and defendants, and of the Intervention of A. Shwartz & Sons, be waived and the cause be tried by the Court.

(Signed) LAZARUS, MOORE & LEMLE,
W. S. BENEDICT,
W. W. HOWE,
for A. Schwartz & Son.
PERCY ROBERTS,
Atty. of H. Kern & Son.

Opinion of Supreme Court of La. in the case of State Ex rel. Victor Mauberret, Prov. Syndic, vs. N. H. Rightor, Judge of Div. "D," Civil Dist. Court. Offered by Plaintiffs & filed Jany. 9 / 93.

United States of America.
State of Louisiana.
Supreme Court of the State of Louisiana.
New Orleans, Monday, January 2, 1893.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors, Francis T. Nicholls, Chief Justice; Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, Associate Justices.

His Honor the Chief Justice pronounced the opinion and Judgment of the Court in the following case:

State ex rel. Victor Mauberret, Provisional Syndic,
vs.
N. H. Rightor & Judge of the Civil District Court, Division "D." } No. 11,141.

Application for Writs of Prohibition and Certiorari.

Relator alleges that by a judgment rendered by the Judge of Division "D" of the Civil District Court for the Parish of Orleans, the commercial firm of H. Kern & Son and the members thereof were granted a respite of Six, Twelve, and Eighteen months. That thereafter, on the 14 Nov., 1892, certain creditors of theirs took a rule against the said firm to show cause why they should not be declared insolvent and make a cession of their property, and a provisional Syndic be appointed to take charge of their effects. That on trial said rule was on 28th Nov., 1892, made absolute, and judgment was thereupon rendered declaring the said firm Insolvents, ordering them to make a cession of their property and appointing Relator Provisional Syndic of their estate. That said Judgment was signed and became final on the 2nd of December, 1892. That thereupon Relator qualified as Provisional Syndic by taking the oath of office, giving his Bond as fixed by the said Judge in his said Judgment, and complying with all the requirements of Law, and received his letters as such Provisional Syndic. That Relator immediately entered upon the discharge of the duties of his office and proceeded to obtain possession

of all the assets and property belonging to said Insolvents, and in furtherance of said object filed an Intervention in the suit of "The H. B. Claflin Co. vs. H. Kern & Son," said Insolvents, which is a proceeding by Attachment against the goods and property and rights of said Insolvents pending in the Circuit Court of the United States for the Eastern District of Louisiana. That in compliance with the said order and Judgment of the said Civil District Court, the said H. Kern & Son on the 8th of December, made a cession of their property and surrendered to your Relator their property as shown by their Schedule then filed, and their said surrender was thereupon accepted by the said Court for the benefit of their Creditors. That thereafter without any notice or demand on Relator the said Judge rendered a Judgment on the 9th day of December, 1892, upon an *ex parte* application in chambers, setting aside, revoking and annulling the former Judgment rendered by him on the 28th day of November, 1892, as aforesaid, removing and destituting Relator from his said office of Provisional Syndic, and appointing one T. C. Sachse to perform the duties of Provisional Syndic of said Estate. Relator avers that the rendition *ex parte* of the said Judgment destituting Relator as aforesaid was an illegal, arbitrary usurpation of power by the said Judge, and that he was without authority or power to render said Judgment, because the law of Louisiana forbids and prohibits the removal of a Provisional Syndic or other such officer, except contradictorily by a direct action or by an appeal from the Judgment appointing him to the proper tribunal. That by this arbitrary exercise and usurpation of power on the part of said Judge, he has been and will be caused irreparable injury and that he has no adequate remedy or relief except by writs of prohibition and certiorari and such other relief as this Court might be competent to grant under its Supervisory Powers. Relator prayed that this Court issue a writ of Certiorari directed to the Hon. N. H. Rightor, Judge of Division "D," Civil District Court, commanding him to send up a certified copy of the proceedings in the suit of H. Kern & Son vs. Their Creditors, and that an alternative writ of prohibition issue directed to said Judge prohibiting him from proceeding further in the said

cause until the further order of this Court, and that he show cause why the said Writs should not be made perpetual and why the said order annulling the said judgment appointing Relator Provisional Syndic should not be annulled and set aside.

The District Judge has sent up the Record as directed and filed an answer denying all the allegations of Relator's petition except such as are therein admitted.

In this answer he admits that H. Kern & Son obtained a respite in 1891 as alleged, and that on the 14th of November, 1892, B. R. Forman, Esq., representing certain creditors of theirs, took a rule on them to show cause why the order granting the respite should not be set aside, and they be ordered to make a cession of their property and a Provisional Syndic be appointed, and that on 28th Nov., 1892, said rule was made absolute, and on suggestion of said Counsel for said creditors, Victor Mauberret (the Civil Sheriff) was appointed Provisional Syndic and his bond fixed at $5000; that he has filed a bond which has not been questioned, and that he otherwise qualified as Provisional Syndic, and that the order appointing him was signed 2nd December, 1892. He denies that Relator, as Provisional Syndic, entered upon the discharge of his duties or took possession of any property of H. Kern & Son, or of either of them, and avers that nothing went into his hands as Provisional Syndic. He further avers that he does not know what he did in the United States Court. That on the 8th of December, 1892, the same creditors who asked for the appointment of Relator as Provisional Syndic, and for the order of the 28th of November, 1892, asked for its revocation; that the Attorney for Relator was present in Court and took notice of the application to revoke and cancel the appointment of Relator, and argued the matter with great zeal. That he did not ask for time or any further notice, and it is not true that, "without any notice or demand upon Relator, Respondent rendered a Judgment on December 9th, 1892, upon an *ex parte* application in Chambers, setting aside, revoking and annulling the former order." That, on the contrary, it was done in open Court after a hearing had on Dec. 8th, and after the attorneys for Relator had been fully heard in open Court, and had not

asked for further time. That the Court took the matter under advisement and rendered its decision on the 9th December in presence of the Counsel for Relator.

That no motion has been made to revoke the order of December 9th, 1892, and no appeal has been taken or asked for. Respondents submits that if any error was committed by him in signing the revoking order of December 9th, 1892, Relator's remedy was by a motion to rescind or by an appeal. That it appeared by sufficient evidence that Relator had no property in his custody or control, and had not taken possession of any property of H. Kern & Son. Respondent further avers, that on December 8th, H. Kern for himself and his firm did make a cession, as appears by the petition filed, but he expressly says "voluntarily," and not under the order of November 28, 1892, and thereupon three creditors representing the aggregate amount of Forty-Eight Dollars asked for the appointment of Relator as Provisional Syndic; he being present by his counsel urging his re-appointment, and seven or eight creditors representing about Eighteen Thousand Dollars, prayed that T. G. Sachse be appointed Provisional Syndic, and exercising his Judicial discretion, he appointed Sachse as Provisional Syndic. That at no time during the course of the proceeding (at all of which Relator was represented by his counsel) was there any exception to the Jurisdiction of his Court taken, nor any want of notice pleaded, nor any delay asked for, and the whole matter was argued before him as Judge of the Court by the attorney for Relator in open Court and was submitted, and Respondent acted after a trial and without any plea, oral or written, to the Jurisdiction of the Court.

An examination of the Record shows that on the 28th of Nov., 1892, at the instance of several of their Creditors, H. Kern & Son, who had in 1891 obtained an order for a Respite were declared insolvents and ordered to make a cession of their property, and Relator was appointed as Provisional Syndic of the Estate, and that he qualified as such. It further shows that on the 8th of December, 1891, the firm presented a petition (accompanied by a Schedule of assets and liabilities), in which they expressed their desire to make a "voluntary surrender," irre-

spective "of any order of Court commanding them to do so." They prayed for an order for a meeting of creditors, for general relief and all needed orders in the premises. On the same day the Court rendered an order accepting this "voluntary surrender," and granting the incidental prayers.

This action of H. Kern & Son seems to have been predicated upon a knowledge on their part that it would be consented to by the parties at whose instance the order of the 28th of November, 1892, was entered; for on the same day their petition was presented these creditors appeared, and suggesting to the Court that H. Kern & Son had made no surrender of their property, had filed no schedule, and that the Provisional Syndic had not gone into actual possession of any of the property, rights or assets of the firm, and that no further proceedings of any kind since the entry and signing of said Judgment had been taken by appearers or said firm, except that said firm had that day made a voluntary surrender, and further suggesting that they, as the creditors at whose instance said Judgment was rendered, did not desire at that time to force the filing of a schedule of the surrender of the property of H. Kern & Son; they consented that the Judgment rendered and signed as aforesaid be vacated, annulled, revoked, and set aside, and prayed that said judgment be at once revoked, annulled and set aside, the appointment of said Provisional Syndic revoked and his bond cancelled.

On the 9th of December, 1892, reciting the written consent of these creditors, and that it had been further made to appear, had H. Kern & Son had not made a cession of their property, nor surrendered the same under the aforesaid Judgment, and that the Provisional Syndic had not gone into actual possession of the property, rights and assets of the said H. Kern & Son, and that it had been made to appear that the said creditors assented to the revocation, annulment and cancellation of the said Judgment, and that the law and the evidence were in favor of the said creditors, the Court ordered and decreed that the Judgment of the 28th Nov., 1892, ordering the forced surrender and appointing Relator Provisional Syndic, be annulled, revoked and set aside, and the appointment of Relator as Provisional

Syndic re-called, cancelled, annulled and declared of no force, virtue or effect, and his Bond cancelled.

On the same day, upon the application of several creditors of H. Kern & Son, T. C. Sachse was appointed by the Court as Provisional Syndic.

It will be seen, from the order or decree of the 9th of Dec., 1892, that it first revoked directly the original order of the 28th of Nov., 1892, declaring H. Kern & Son Insolvents, and directing the firm to make a forced surrender and appointing Relator Provisional Syndic, and next, directly revoked and re-called Relator's appointment as Provisional Syndic, and the latter's complaint is levelled exclusively at that portion of it having reference to himself. Relator, in his pleadings, ignores that portion revoking the order for a forced surrender, and he assumes that the cession made by H. Kern & Son was under and by force of the action taken against them by the creditors.

Relator is mistaken in designating as a "Judgment," that portion of the order of the 28th of November, which appointed him Provisional Syndic, and in seeking to apply to it rules applicable to Judgments. What he relies on as a Judgment is a mere temporary conservatory order which the Judge has the authority and the right to modify at his discretion.

The definitive Syndic is in a sense the Agent of the Creditors, but the Provisional Syndic is at best an officer of the Court. He has no vested right to the position, but holds it subject to the pleasure of the Judge, in so far as he himself is individually concerned. It by no means follows that because the "Provisional Syndicship" continues until the appointment of a Syndic proper, that a particular person can successfully claim that, as Provisional Syndic, he holds by a fixed tenure during that same period. In the present case the Court thought proper to revoke the order by which H. Kern & Son were thrown into forced insolvency. Relator was absolutely without right or interest to control the Judge as to this action before, or to question its legality or its propriety after it had been taken. If it be subject to criticism or attack it must be at the hands of some one who has legal concern in it, and that the Relator has not.

A Sheriff could just as well contend that he could legally

object to the action of a Court in dissolving an attachment or an Injunction where the parties in interest consent to it, by reason of his actual or prospective fees in the matter.

When the order for a forced surrender was revoked Relator's appointment fell, as a necessary consequence of the revocation. It was incidental or auxiliary to that order, and shared its fate.

In L'Engle vs. The Florida Railroad Company, the Supreme Court of Florida, in disposing of an appeal taken by a Receiver from an order vacating on motion his appointment, said:

"The Receiver should not have been heard in opposition to this motion. He is not a party in interest. He has no standing in Court for that purpose. He has no right to intermeddle in questions affecting the rights of the parties or the disposition of property in his hands. 3rd Md. Ch. Rep. 303.

"When his accounts come up for adjustment his relations will be different. He will then be a party in interest and may be heard, and it will be the duty of the Court to see that his rights are fully protected." (14 Florida, 267).

In the case before us the Provisional Syndic has received no property.

The application has no possible foundation on which to stand.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed, that the provisional order herein given be rescinded, and that the Writs of Certiorari and Prohibition asked for be and the same are hereby refused.

The judgment having become final, the foregoing is a true copy of the original opinion and judgment rendered in the case of:

State ex rel. Victor Mauberret vs. N. H. Rightor, Judge of the Civil District Court, Division "D." No. 11,141.

Clerk's Office, New Orleans, ———, 1893.

————————, Clk.

(*Syllabus*).

1. Where an order of Court, directing a forced sur-

render, and under which the District Judge has appointed a Provisional Syndic, has been revoked by consent of the parties at whose instance it was rendered, the Provisional Syndic has no legal interest or standing in court to contest the action of the Judge in revoking the order.

2. The order appointing him Provisional Syndic was not a Judgment. It was a mere ancillary conservatory order, which shared the fate and fell with that to which it was incidental.

3. A definitive Syndic is, in a sense, the Agent of the creditors; but a Provisional Syndic is at best an officer of the Court. He has no vested right to his position entitling him to hold it until divested from the same by direct action.

Discontinuance of Garnishment against A. Shwartz & Sons. Filed Jany. 10, 1893.

H. B. Claflin & Co.
vs.
H. Kern & Son,
A. Schwartz & Sons,
Intervenor.

And now comes The H. B. Claflin Co., plffs., through their undersigned counsel, and move to discontinue the garnishment process against A. Schwartz & Sons issued herein without prejudice to the writ of attachment and the assertion of title to the property seized thereunder by A. Schwartz & Sons and the bond for the release of said attached property.

Hearing and Continuance.

Extract from the Minutes, January 10th, 1893.

The H. B. Claflin Co.
vs.
H. Kern & Son,
A. Shwartz & Sons, Intervenors.
No. 12,059.

This cause, as continued from yesterday, was this day resumed, and the counsel for the parties respectively being

all present, the trial was proceeded with. After hearing pleadings, and evidence in part, the court ordered the cause to go over until to-morrow.

Hearing and Continuance.

Extract from the Minutes of January 11, 1893.

H. B. Claflin Co.
vs.
H. Kern & Son.
A. Shwartz & Sons, Intervenors. } No. 12,059.

This cause came on this day to be further heard. After hearing further evidence, it was ordered that the cause be continued until to-morrow at 11 :30 A. M.

Continuance.

Extract from the Minutes of Jany. 12, 1893.

H. B. Claflin Co.
vs.
H. Kern & Son.
A. Shwartz & Sons, Intervenors. } No. 12,059.

This cause, as continued from yesterday, came on this day to be further heard, counsel for the parties being present. After hearing further evidence, the cause was continued until to-morrow at 11 A. M.

Continuance.

Extract from the Minutes of January 13, 1893.

H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

On motion of counsel for the parties, it is ordered that this cause be continued to Monday, January 16, 1893, at 11 A. M.

Continuance.

Extract from the Minutes of Jany. 16, 1893.

H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

On motion of counsel for the parties, it was ordered that this cause be continued until to-morrow at 11 A. M.

Continuance.

Extract from the Minutes of Jany. 17, 1893.

The H. B. Claflin Co.
vs.
H. Kern & Son.
A. Schwartz & Sons, Intervenors.
} No. 12,059.

On motion of the counsel for the parties, it is ordered that this cause be continued until Monday, January 23, 1893, at 11 A. M.

Hearing and Continuance.

Extract from the Minutes of Jany. 23, 1893.

H. B. Claflin Co.
vs.
H. Kern & Son,
Schwartz & Sons, Intervenors.
} No. 12,059.

This cause as continued from a former day was this day resumed, and the counsel for the respective parties being all present, was proceeded with. After hearing further evidence the Court ordered the same to go over until to-morrow at 11 o'clock A. M.

Continuance.

Extract from the Minutes of Jany. 25, 1893.

The H. B. Claflin Co.
vs.
H. Kern & Son.
A. Shwartz & Sons, Intervenors.
} No. 12,059.

This cause continued from yesterday was not reached owing to the adjournment of the Court, out of respect to the memory of one of the members of the bar.

Hearing and Continuance.

Extract from the Minutes of Jany. 26, 1893.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

This cause as continued from yesterday was this day resumed, and the counsel for the parties respectively being all present, the trial was proceeded with. After hearing further evidence, it was ordered that the cause be continued to Monday, January 30, 1893, for further hearing.

Hearing and Continuance.

Extract from the Minutes of Jany. 30, 1893.

H. B. Claflin Co.
vs.
H. Kern & Son.
A. Shwartz & Sons, Intervenors. } No. 12,059.

This cause, as continued from Thursday, Jan. 26 | 93, was this day resumed, and the counsel for the parties respectively being present, the trial was proceeded with. After hearing further evidence, it was ordered that the cause be continued until to-morrow at 11 A. M.

Order—Hearing and the further taking of testimony to proceed in Clerk's Office before E. R. Hunt, Commissioner.

Extract from the Minutes of Jany. 31, 1893.

The H. B. Claflin Co.
vs.
H. Kern & Son.
A. Shwartz & Sons, Intervenors. } No. 12,059.

This cause, as continued from yesterday, was this day resumed, the counsel for the parties being present, whereupon it was ordered, counsel for all parties consenting in open court, that the further taking of testimony proceed in the Clerk's office before E. R. Hunt, Esq., Commissioner, reserving to both parties the right, if they desire, to have the testimony of any witness or witnesses taken in open court.

Order—Case re-assigned.

Extract from the Minutes of Feby. 15, 1893.

H. B. Claflin Co.
vs.
H. Kern & Son,
A. Shwartz & Sons, Int'v'rs. } No. 12,059.

On motion of H. L. Lazarus, of counsel for plaintiff, it is ordered that the trial of this cause be resumed on Wednesday, February 22, 1893, at 11 A. M.

Continuance.

Extract from the Minutes of Feby. 22, 1893.

H. B. Claflin Co.
vs.
H. Kern & Son,
A. Shwartz & Sons, Intervenors. } No. 12,059.

This case, not being reached this day, on motion of counsel for the parties, it is ordered that the same be continued to Saturday, February 25, 1893, at 1 o'clock P. M.

Hearing and Continuance.

Extract from the Minutes of Feby. 25, 1893.

H. B. Claflin & Co.
vs.
H. Kern & Son,
A. Shwartz & Sons, Intervenors. } No. 12,059.

This cause came on this day to be further heard. After hearing further evidence, on motion of counsel, it was ordered that the same be continued to Monday, February 27, 1893, at 11 A. M.

Statement of W. S. Benedict. Filed Feby. 25, 1893.

The H. B. Claflin Co.
vs.
H. Kern & Son et al. } No. 12,059. United States Circuit Court.

Statement of W. S. Benedict.

There was no written contract respecting the trust estab-

lished by H. Kern & Son, in view of the attachment, to protect A. Shwartz & Sons. The check for $37,500, which has been offered in evidence, was held by F. J. Dreyfous, as trustee under this trust, and from its proceeds various payments were made by H. Kern & Son, down to May 2nd, 1892. Mr. Dreyfous, having retired from the trust, the balance of $27,415.56 was turned over to me as money of H. Kern & Son, to be held in trust for the same purpose, viz., to protect A. Shwartz & Sons from danger of double liability in the premises.

By consent of H. Kern & Son, the following sums were paid from the said fund of.....$27,415.56 viz:

1st.	Stenographer's fees.....	$ 368.15	
2nd.	J. A. Mercier, rent due by H. Kern & Son on the Canal street store, up to sale of Feby. 20th, 1892.....	$7,083.33	
3d.	P. Roberts & B. Titche, Attorneys of H. Kern & Son.	$1,000.00	$ 8,451.48
	Balance.....		$18,964.08

A balance of $18,500, funds of H. Kern & Son, is held by me under the trust to protect A. Shwartz & Sons in the premises. The further balance of $464.08 is also in my hands less payments for disbursements incidental to the trust. (Signed) W. S. BENEDICT.

Continuance—Case fixed for argument.

Extract from the Minutes of Feby. 27, 1893.

The H. B. Claflin Co.
vs.
H. Kern & Son.
A. Shwartz & Sons, Intervenors. } No. 12,059.

On motion of Lazarus, Moore & Lemle, attorneys for the plaintiff, it is ordered that this cause be fixed for argument on Friday, March 3, 1893, at 11 A. M.

Stipulation & Agreement. Filed March 3, 1893.

The H. B. Claflin Company } No. 12,059.
vs. } United States Circuit Court.
H. Kern & Son.

It is agreed and understood that A. Shwartz departed this life on the 8th of March, 1892, and that, thereafter, S. J. Shwartz retired from the intervenor's firm. That from the time of his retirement, in July, 1892, the firm has been and is now composed of Mrs. Widow A. Shwartz, N. I. Shwartz and Leon Shwartz, which firm has succeeded to and possesses the rights and assets of the intervenors and has assumed their liabilities, including any which may arise on the bond given by said intervenors herein, and the intervention is to stand as thus amended.

(Signed) LAZARUS, MOORE & LEMLE,
(Signed) W. S. BENEDICT, *Attys. for Plfs.*
HOWE & PRENTISS,
for Intervenors.
PERCY ROBERTS,
Atty. of H. Kern & Son.

An order may be entered on this *nunc pro tunc* as of date of filing, viz: March 3, 1893.

(Signed) HOWE & PRENTISS,
LAZARUS, MOORE & LEMLE,
PERCY ROBERTS,
Atty. of H. Kern & Son.

Hearing and Submission.

Extract from the Minutes of March 3, 1893.

The H. B. Claflin Co.
vs.
H. Kern & Son.
A. Shwartz & Sons. } No. 12,059.

This cause came on this day to be further heard,
Lazarus, Moore & Lemle appearing for plaintiff,
W. S. Benedict and W. W. Howe for A. Shwartz & Sons, Intervenors,
Percy Roberts for Defendants;
and was argued by the counsel for the parties and submitted—when the Court took time to consider.

Motion and Order on death of Emile Kern and making Mrs. Henry Kern and Henry Kern parties. Entered and filed March 10th, 1893.

The H. B. Claflin Co. *vs.* H. Kern & Son } No. 12,059. U. S. Circuit Court for the 5th Circuit and Eastern District of Louisiana.

On motion of Lazarus, Moore & Lemle, of counsel for the H. B. Claflin Co., and on suggesting to the court and on now giving the court to be informed and understand, that since the institution of this suit, the citation herein issued thereon, and the trial thereof, and the submission of the cause, Emile Kern, a member of the firm of H. Kern & Son, and one of the defendants in said cause, who joined issue therein, has departed this life, as appears by the affidavit hereto annexed and made part of this motion.

And on further suggesting to the court that said Emile Kern died intestate; that he was unmarried, and that his sole heirs are Henry Kern, his father, and Mrs. Henry Kern, his mother; and that Henry Kern and Mrs. Henry Kern should be made parties hereto, they being the heirs of said deceased; and that the judgment to be rendered herein should be rendered for or against his said heirs:

It is ordered, that this motion be spread of record upon the minutes of the court; that Henry Kern and Mrs. Henry Kern be made parties hereto; that a duly certified copy hereof be served upon Henry Kern and Mrs. Henry Kern, the father and mother of said deceased Emile Kern; and that whatever judgment be rendered in this cause, be rendered for or against said heirs, representing said Emile Kern.

Affidavit.

Before me, the undersigned authority, personally came and appeared Henry L. Lazarus, who on oath declares that Emile Kern, a member of the firm of H. Kern & Son, departed this life or or about the 2nd day of March, 1892; that the said Emile Kern was unmarried; that he left no descendants, and that his sole heirs are his father, Henry Kern, and his mother, the wife of said Henry Kern: So help him God. (Signed) HENRY L. LAZARUS.

Sworn to and subscribed before me this 9 day of March, 1893.

(Signed) H. J. CARTER,
U. S. Commissioner.

Marshal's Return.

Received by U. S. Marshal, New Orleans, La., Mch. 10 | 93, and on the same day I served copy hereof on Mr. Henry Kern, by handing the same to him in person, at his domicile in the City of New Orleans, La.; and on Mrs. Henry Kern, by leaving the same at her domicile in the City of New Orleans, La., in the hands of her husband, Henry Kern, a person apparently above the age of 14 years, at and residing at the domicile of Mrs. Henry Kern, she being at the time of said service sick in bed, and I was unable to see her—all of which facts I learned by interrogating the said Henry Kern.

(Signed) J. B. DONNALLY, *U. S. Marshal,*
By C. A. DONNALLY, *Dy.*

Order—Cause referred to H. J. Carter, Esq., Commissioner, to report Facts established by evidence.

Extract from the Minutes of March 14, 1893.

The H. B. Claflin Co.
vs.
H. Kern & Son,
A. Shwartz & Sons, Intervenors. } No. 12,059.

By agreement of the counsel for the parties herein, it is ordered that this cause be referred to H. J. Carter, Esq., Commissioner, to make a report as to the facts established by the evidence on file herein.

Stipulation as to fee to be allowed Commissioner. Filed April 8, 1893.

Circuit Court of the United States,
Eastern District of Louisiana.

H. B. Claflin Co.
vs.
H. Kern and Son,
A. Shwartz and Sons. } No. 12,059.

It is hereby stipulated between the undersigned parties herein that the fee to be allowed the Commissioner, H. J. Carter, for his services, shall be taxed as costs in this cause.

(Signed) LAZARUS, MOORE & LEMLE,
Attys. for The H. B. Claflin Co.
HOWE & PRENTISS,
for Schwartz & Sons.
PERCY ROBERTS,
Atty. of H. Kern & Son.

Opinion of Court, findings of fact and conclusions of law. Filed April 21, 1893.

Circuit Court of the United States,
Eastern District of Louisiana.

H. B. Claflin Co.
vs.
H. Kern & Son.
A. Shwartz & Sons, Intervenors. } No. 12,059.

Billings, Judge:

On Feb. 20th, 1892, the following contract was entered into between the defendants and intervenors:

Agreement.

This agreement, entered into this 20th day of Feb., 1892, between H. Kern & Son, of the first part, and A. Shwartz & Sons, of the second part; Witnesseth: The said H. Kern & Son agree to sell to said A. Shwartz & Sons, who bind themselves to purchase, the entire stock in trade, merchandize, fixtures and all the appurtenances of the dry goods store, corner of Canal and Dauphine Sts., with no other exception than one iron safe, one desk and one stove.

This sale is to be made on the following basis, viz:

First. All piece goods having over ten yards and all other merchandize upon which the cost price shall be marked, to be taken at said cost, less ten per cent. upon the aggregate amount;

Second. All remnants or piece goods measuring less than ten yards shall be taken at the selling price, less fifty per cent. upon the aggregate amount;

Third. All piece goods measuring more than ten yards, and other merchandize upon which the cost price is not

marked, shall be taken at the selling price, less twenty-five per cent. upon the aggregate sum;

Fourth. The invoices for all goods in transit, purchased by said H. Kern & Son, shall be turned over to the purchasers, who, upon delivery of said goods, shall assume the amount of said invoices and be responsible therefor;

Fifth. All the furniture, tools, and fixtures (save those above mentioned) shall be accepted for the price of one thousand dollars.

Sixth. In order to expedite the ascertainment of the price of the within sale, the said parties of the first and second parts shall put at once as many clerks as they may deem necessary (satisfactory to both parties), to measure all unmeasured piece goods and count all other merchandise; thereupon persons representing both parties shall call off the said merchandize to others likewise representing both parties (in such manner as complete fairness shall exist), who shall enter the merchandize in books numbered alike, a copy of which to belong to either party. As soon as the entire stock shall have been thus entered, the parties of the first and second parts shall proceed, without unnecessary loss of time, to the ascertainment of the value of said stock of merchandize on the basis above established, which value shall be thereupon paid in cash by said A. Shwartz & Sons to said H. Kern & Son.

Seventh. The book accounts are not included in this sale, but shall remain the property of said H. Kern & Son, and for the purpose of facilitating the settlements of said firm and the collections, they shall be allowed the use of space within the building for a reasonable time, free of rent.

Eighth. The said A. Shwartz & Sons shall enter into immediate possession of the said stock of merchandise, and be permitted to dispose of the same, as they may deem best, after the said goods shall have been duly entered, as stipulated in paragraph sixth—nor shall any delay in the ascertainment of the total of the amount of the present sale delay the delivery of said goods to said A. Shwartz & Sons.

Ninth. The lease to the building shall be transferred to said A. Shwartz & Sons by said H. Kern & Son, who shall obtain the consent of the owner thereto.

Tenth. In order to bind the present sale and agreement the said A. Shwartz & Sons have presently paid to the said H. Kern & Son, who acknowledge the receipt thereof, the sum of Forty Thousand dollars. It being well understood, that in the event the stock, etc., hereby sold, should be found, under the present agreement, to be worth less than sum, the said H. Kern & Son shall make good the difference; likewise, should the said stock, etc., be found to exceed the amount herein paid, the said A. Shwartz & Sons shall pay said difference to H. Kern & Son, as soon as ascertained.

Thirty-three words erased, null and void.

At the moment of signing it was agreed, that in case of disagreement in the carrying out of the present agreement, between the parties of the first and second parts, the matter in difference shall be submitted to arbitration—Henry Beer to act on the part of H. Kern & Son and Gus. Lehman, Sr., to act on the part of A. Shwartz & Sons—these two to appoint an umpire, the parties to abide by the award of the majority of the arbitrators.

Signed in presence of: H. KERN & SON,
F. J. DREYFOUS, EMILE KERN,
G. LEHMAN. A. SHWARTZ & SONS.

The 20th of February fell on Saturday. At from half-past seven to eight A. M. on Sunday morning, Feb. 21st, the measuring and counting of the merchandize commenced; it was continued during Sunday and into Monday. The levy of the attachment by the Marshall was made on Monday afternoon between 2:15 and 2:30.

As to the time when the measuring, counting, and entering in the nine books duplicated, without the extension of the price, were completed.

On this issue, on the part of the intervenors, 29 witnesses were called; 19 testified that they, individually, completed their work before the time of the levy of the writ, one testifies that he does not remember the time, one testifies that his work was completed on Monday evening, or after the levy, one testifies that entries were being made during the time after the levy, four who were not engaged in taking the inventory, and who were not there Sunday or Monday, but reported Tuesday for work, did not know of their own

knowledge the time that the inventory was completed, but didn't see any inventorying going on in their department; one testifies that the inventory was completed before the levy, and the two Mess. Shwartz' testimony is to the effect that while the entries were not entirely completed, there being some things left unfinished, the entries were made before the levy.

On the part of the plaintiffs, 16 clerks testify that they completed the measuring and the counting and entering not till after the time of the levy, one testifies that he completed his work before the levy, one testifies that the clerks were measuring and counting goods after the levy, and two do not remember the time.

The Chief Deputy Marshal testifies that the measuring was going on after the levy was made.

Another Deputy testifies that they were unrolling goods and taking down goods from the shelves and placing them on the counter. He says he judges they were measuring. A third Deputy who was not there Monday, but was there Tuesday, does not testify as positively as the others, but says they were taking down goods from the shelves and putting them on the counter, but does not testify that on Tuesday they were counting or measuring.

Capt. Donnally, the U. S. Marshal, testifies that Monday evening he was at the store and heard them quarrelling and contending about the quantity or measurement of goods.

The senior Mr. Kern, one of the defendants, testified that the measuring and the counting were concluded at 5 or 6 o'clock Monday evening.

It is to be observed that 23 witnesses testify to the completion of the measuring and counting before the levy of the writ, 24 testify to the contrary that the levy was made before the counting or measuring was finished.

Of the 23 witnesses 21 were clerks now in the employ of the intervenors, and two were the intervenors.

Of the 24 witnesses, nine were in the employ of the defendants, eight were formerly, but not now in the employ of the intervenors, two are now in the employ of the intervenors, four were the Marshal and his Deputies; the remaining one was the senior defendant, Kern.

This summary shows that the preponderance of testimony is against the claim of the intervenors and in favor of that of the plaintiff, and I find, as a fact, that the levy of the writ of attachment was made before the measuring, counting and entering without extension of the price of the goods was completed.

I find further, as facts, that on Saturday two checks, amounting in the aggregate to $40,000, were delivered by the intervenors to the defendants as the estimated price of the whole stock of goods agreed to be sold.

That on Sunday evening the defendants delivered the keys of the store to the intervenors, who opened the store with them on Monday morning.

That on Monday, after the levy of the writ of the plaintiff, neither of the two checks having been presented for payment not having been paid, an agreement was entered into between the intervenors and the defendants that the whole of the purchase price of the goods sold, except the $2500 belonging to G. Lehman, should be deposited with and held by F. J. Dreyfous in trust, to protect A. Shwartz & Sons from loss in case their title to the stock of goods should not be maintained.

That it appears from the evidence that from this amount so deposited with Dreyfous, payments were made on the Drafts of the defendants, so that the amount was reduced to $27,415.56, down to May 2nd, 1892, and that subsequently this last amount was turned over to W. S. Benedict, Esq., who received the same, and holds and has paid a portion of the same, as appears from his statement.

The H. B. Claflin Co. } No. 12,059.
vs.
H. Kern and Son et als. } U. S. Circuit Court.

Statement of W. S. Benedict.

There was no written contract respecting the trust established by H. Kern & Son in view of the attachment, to protect A. Shwartz & Sons. The check for $37,500, which has been offered in evidence, was held by F. J. Dreyfous as Trustee under this trust, and from its proceeds various payments were made by H. Kern and Son down to May 2nd, 1892. Mr. Dreyfous, having retired from the trust, the balance of $27,415.56 was turned over to me as money of H.

Kern & Son, to be held in trust for the same purpose, viz: to protect A. Shwartz from danger of double liability in the premises.

By consent of H. Kern & Son, the following sums were paid from the said fund of..... $27,415.48 viz:

1st.	Stenographer's fees.....	$ 368.15	
2d.	J. A. Mercier, rent due by H. Kern & Son on the Canal Street store up to sale of Feby. 20, 1892.....	7083.33	
3rd.	P. Roberts & B. Titche, Attorneys of H. Kern & Son.	1000.00	— $ 8,451.48
	Balance.....		$18,964.00

A Balance of $18,500, funds of H. Kern & Son, is held by me under the trust to protect A. Shwartz & Sons in the premises. The further balance of $464.08 is also in my hands, less payments for disbursements incidental to the trust. W. S. BENEDICT.

That it also appears that the defendants, after their insolvency, gave information as to this amount so held, surrendered by Mr. Dreyfous and Mr. Benedict to the Insolvent Court and the terms and conditions upon which it was deposited and held.

The facts as to the defendants' adjudication as insolvents and the proceedings in the Insolvent Court, appear in the findings of the Court upon the motions for a new trial filed Dec. 17, 1892, which are adopted and made part of these findings. [See pages 57 to 77 and pages 80 to 88 of this transcript].

Upon these facts two questions arise:

1st. But for the peculiar arrangement as to the disposition of the price of these goods, and laying that for the time being out of consideration, would the sale have been complete and would the title to the goods have passed to the intervenors?

There had been a delivery symbolical and actual. $40,000 had been given in checks as the estimated price which was to be ascertained by measuring and counting,

and the price increased or diminished, and paid or returned accordingly.

I think, laying aside the consideration of the agreement as to price, the case of Shuff vs. Morgan, 9 Martin U. S., p. 592, is in substance this case. In each case there was a delivery, and nothing remained to be done but the ascertainment of quantity. Articles 2458 and 2459 are but reenactments of Arts. 6 and 7 under title VI, p. 346, the code of 1808. In the case of Shuff vs. Morgan, the Court held that the rule *res perit domino* was a general but not a universal one; that with complete title in the vendee for him to run the risk of the destruction of the property sold was of the *nature* but not of the essence of the contract of sale, and that the reservation by the statute of the risk in the vendor did not prevent the title to the thing agreed to be sold passing to the vendor so as to prevent a creditor of the vendor from making a valid attachment.

There is nothing peculiar in the provision in the contract of sale in this case. It was in substance the same as in Shuff vs. Morgan. The whole effect of paragraph 8, when considered in connection with paragraph 6, is that the stock of goods was sold and the title was vested in the vendors, the intervenors. There was to be a tale of the goods to determine the exact amount of the price. The case of Shuff vs. Morgan was decided in the year 1824, and has never been overruled or called in question. So that so far as concerns the provision as to the tale, the property would have passed.

There remains the question as to what the Court must say as to the effect of the arrangement about the price.

The facts necessary to be considered are these: A debtor is in failing circumstances, a sale of his whole stock of goods is made. The consideration is $40,000. For this amount checks are given. Before the checks are paid or presented a creditor levies an attachment. By a secret agreement between the seller and the purchaser the whole price ($40,000) is placed in trust in the hands of a third person to indemnify the purchaser against loss by service of the attachment. The legal effect of such a qualification of an agreement to sell is to subordinate the question of who shall receive the consideration to the question as to

the validity of the sale. The trustee holds in trust for the vendor in case the sale shall be held to be valid, and for the vendee in case it shall be held to be void, and it is a secret trust. In the eyes of the creditors the property has been placed beyond the reach of the creditors by the sale—by this secret trust the consideration for the sale also is placed beyond their reach. It is a sale if the attachment is defeated, and no sale if it is maintained.

To render a sale valid there must be price. That price cannot conditionally belong to the purchaser. Nor can the indications of a payment be held out which are not according to fact, when the necessary effect of such indications must be to baffle the creditors of the vendor.

I think such a transaction, before the checks have been paid, engrafts on to the sale a qualification which becomes a part of the original agreement of sale, and characterizes it precisely as if it had been made along with it; and that Courts must declare a transaction with such a feature invalid and ineffectual to defeat the rights of the attaching creditor to the extent of his attachment.

The conclusions of law from the facts above found are:

1st. That the attachment was dissolved by the insolvency proceedings in which the defendants made and the proper Court accepted a surrender of all their property. Sec. 933 R. S., 9 vol., Stat. p. 213 and 214, especially the intent and meaning of the Statute, as shown in the title and as declared in the body of the act.

2nd. That the plaintiffs have and recover against the defendants $21,728.00, with interest as prayed for in their petition, and their entire costs in the cause and upon the attachment up to the time of the surrender, without any lien or privilege resulting from the attachment.

3rd. That the intervention of A. Shwartz and Sons be dismissed, and that they pay the costs of the intervention.

The Court finds as further facts, as follows:

That Monday, February 22, 1892, was a legal holiday, and under the State Law the Banks in New Orleans were closed.

Also, that the Intervenors' store on the Cor. of Bourbon and Canal streets was burned on the 17th of February, 1892,

and that they were seeking for another store and stock of goods to continue their business and employ their clerks.

(Signed) EDWARD C. BILLINGS, *Judge.*

Judgment.

Extract from the Judgment-Book.
Circuit Court of the United States.
Fifth Circuit and Eastern District of Louisiana.
November Term, 1892.
New Orleans, Friday, April 21, 1893.

Court met, pursuant to adjournment:
Present, Hon. Edward C. Billings, District Judge.

The H. B. Claflin Co.
vs.
H. Kern & Son.
A. Schwartz & Sons, Intervenors. } No. 12,059.

For the reasons assigned in the written opinion, this day delivered and filed:

It is now here ordered, adjudged and decreed, that the H. B. Claflin Co., plaintiffs herein, do have and recover judgment against H. Kern & Sons, and *in solido* against Henry Kern and against the legal heirs and representatives of Emile Kern, made parties in this cause, in the full and entire sum of Twenty-one thousand seven hundred and twenty-two ($21,722.00) Dollars with interest at the rate of five (5%) per cent. per annum on Sixteen hundred and forty ($1640.00) Dollars, from January 29th, 1892, until paid.

With interest on Sixteen hundred and forty-seven ($1647.00) dollars at the rate of five (5%) per cent. per annum from February 19th, 1892, until paid.

With interest at the rate of five (5%) per cent. per annum on Twenty-six hundred and forty-seven & 98-100 ($2647.98) dollars from Febry. 28th, 1892, until paid.

With interest at the rate of five per cent. per annum on Twenty-three hundred and fifty & 69-100 ($2350.69) Dollars from March 16th, 1892, until paid.

With interest at the rate of five per cent. per annum on Eleven hundred and forty-one & 22-100 ($1141.22) dollars from March 16, 1892.

With interest at the rate of five per cent. per annum on

Eight hundred and eleven & 06-100 ($811.06) dollars from April 6th, 1892, until paid.

With interest at the rate of five per cent. per annum on Seventeen hundred and eighty-three & 36-100 ($1783.36) dollars from May 14th, 1892.

With interest at the rate of five per cent. per annum on Eleven hundred and one & 23-100 ($1101.23) Dollars from July 23d, 1892.

With interest at the rate of five per cent. per annum on Seven hundred and sixty-four & 70-100 ($764.70) Dollars from August 9th, 1892, until paid.

With interest at the rate of five per cent. per annum on Twenty-three hundred and fifty & 69-100 ($2350.69) Dollars from September 13th, 1892, until paid.

With interest at the rate of five per cent. per annum on Sixteen hundred and twenty-two & 39-100 ($1622.39) dollars from December 24th, 1892, until paid.

With interest at the rate of five per cent. per annum on Twenty-three hundred and fifty & 69-100 ($2350.69) Dollars, from March 13th, 1893, until paid, and with interest at the rate of five per cent. per annum on fifteen hundred and ten & 99-100 ($1510.99) dollars from March 1st, 1892, until paid; defendants to pay the entire costs herein, and the costs of the attachment up to December 8, 1892.

It is further ordered, adjudged and decreed, for the reasons assigned in the opinion of the Court filed this day, that the agreement of February 20th, 1892, herein, did not transfer to the Intervenors, A. Shwartz & Sons, the property attached so as to affect the rights of the plaintiffs as attaching creditors of the defendants herein, and that the said intervention be and the same is hereby dismissed at intervenors' costs.

Judgment rendered April 21, 1893.

Judgment signed April 22, 1893.

(Signed) EDWARD C. BILLINGS, *Judge.*

Motion and Suggestion of Defendants to dissolve Attachment, Presented March 3, 1893,—application to file same taken under advisement. Filed April 21, 1893.

H. B. Claflin & Co., *vs.* H. Kern & Son. } No. 12,059.

Now come H. Kern & Son by undersigned counsel, and represent that they made a cession of their property in the Civil District Court for this Parish, in the insolvency proceedings entitled H. Kern & Son vs. Their Creditors, No. 33,424 of the Docket of said Civil Dist. Court, as already suggested to the court in their motion for a new trial filed in this Court on the 8th of December, 1892, and which said new trial has been allowed; as will more fully appear from the certified copy of said proceedings in the said Civil Dist. Court, offered in evidence herein by said Kern & Son, Jany. 23d, 1893, and made part hereof.

Wherefore, they pray leave to file this motion, and that the Attachment sued out against said Kern & Son by the H. B. Claflin Co. be set aside and dissolved.

(Signed) PERCY ROBERTS,
Atty. of H. Kern & Son.

Order—Motion of H. Kern & Son to dissolve Attachment. Leave to file Granted.

Extract from the Minutes of April 22, 1893.

The H. B. Claflin Co.
vs.
H. Kern & Son.
A. Shwartz & Sons, Intervenors. } No. 12,059.

In this case the defendants having, on March 3, 1893, the day this cause was submitted, presented a motion asking leave to file same to dissolve the attachment herein on the ground of the proceedings in insolvency of said defendants, and the Court having taken the application under advisement, it is now ordered that the same be granted.

Order substituting parties as intervenors. Entered and filed April 24, 1893, as of date March 3, 1892, nunc pro tunc.

U. S. Circuit Court.
Eastern District of Louisiana.

The H. B. Claflin Company
vs.
H. Kern & Son,
A. Schwartz & Son, Intervenors. } No. 12,059.

On motion of Rouse & Grant and Howe & Prentiss, attorneys for Intervenors, and suggesting the stipulation

and agreement hereto appended as part hereof, and which was made and filed March 3d, 1893, and the entry of formal order thereon having been by oversight omitted:

It is now ordered that Mrs. Widow Abram Schwartz, Nathan I. Schwartz and Leon Schwartz, who constitute the Intervenors' firm since July, 1892, be substituted as intervenors herein as of March 3d, 1892, and that the intervention stand as thus amended, and that this order be made and filed *nunc pro tunc* as of March 3, 1892.

Bill of Exception. Filed May 2nd, 1893.

The H. B. Claflin & Co.
vs.
H. Kern & Son and A. Schwartz & Sons. } No. 12,059.

Be it remembered, that on this 2nd day of May, 1893, the plaintiffs requested the Court to make and file additional findings of fact in said cause, to which the Intervenors, A. Schwartz & Sons, and Mrs. Abram Schwartz, Nathan I. Schwartz and Leon Schwartz, then and there objected, because the term at which the original findings were made, and the judgment was rendered, had passed, and the Court was without power to amend the same, or add thereto thereafter.

But the Court overruled said objections and made the findings of fact Marked "A" part thereof, and ordered the same filed, which was done accordingly on the 2nd day of May, 1893, to which rulings and order said intervenors then and there, and at the time of the making of said rulings and order, excepted and still excepts thereto, and tendered this their Bill of Exceptions, and prayed the Court to sign and seal the same, which is now here done accordingly by the Court, this 2nd day of May, 1893.

EDWARD C. BILLINGS, *Judge.*

Additional Findings of Fact, marked "A," made part of Intervenors' Bill of Exceptions. Filed May 2, 1893.

U. S. Circuit Court.

H. B. Claflin Co.
vs.
H. Kern & Son.
A. Shwartz & Sons, Intvenors. } No. 12,059. "A."

Additional Findings of Facts Made at the Request of the Plaintiffs.

The agreement of Feby. 20th, 1892, was drawn up by Mr. F. J. Dreyfous, attorney for H. Kern & Son, and the substance of the same was dictated by Mr. N. I. Schwartz, of the firm of A. Schwartz & Sons, and was signed by the parties on Saturday evening, Feby. 20th, 1892. Another document was drawn up by Mr. F. J. Dreyfous, dated Feby. 20th, 1892, and signed by Henry Beer on said date, and is as follows:

"I hereby agree to make good to A. Schwartz & Sons all difference between the sum of $40,000, paid by said A. Schwartz & Sons to H. Kern & Son, as an earnest to bind the sale of the stock, etc., in the store Cor. Dauphine and Canal streets—and the actual value of said stock, as ascertained under the basis of the agreement signed this day between them."

New Orleans, Feb. 20 | 92.

(Signed) HENRY BEER."

On the same day two checks were drawn by A. Schwartz & Sons in favor of H. Kern & Son, each dated Feb. 20 | 92, one on the Whitney National Bank for $37,500.00, and the other on the People's Bank for $2,500.00, both amounting to $40,000.00; being the sum mentioned in the agreement to bind the sale and agreement. These checks were not collected by Mr. Kern, and it does not appear that he received any of the money, Excepting as is stated in the findings filed by the Court, filed April 21 | 93. The $2500 check was paid to Lehman, the Broker, who the sale.

On Feb. 20 | 92, the date on which the checks were drawn, the firm of A Schwartz & Sons had cash on hand, in the Whitney National Bank to their credit, to the sum of $179.46. No arrangement had been made with the bank itself by A. Schwartz & Sons to have the check for $37,500.00 paid, but an arrangement had been made by Mr. N. I. Schwartz, of Schwartz & Sons, with Mr. Isidore Newman, to borrow a sufficient sum of money to enable the firm to meet the check of $37,500, the terms of the sale not being arrived at until Saturday Night.

The money to cover the said check of $37,500.00 was de-

posited in the bank, according to the entry in the bank book, on Feb. 24th, 1892 (Wednesday).

The checks were paid as follows: the one for $37,500.00 on Feb. 25 | 92 (Thursday); and the one for $2500.00 on the same date, at the People's Bank. They do not bear the Clearing house stamp, and were evidently paid over the counter.

The checks bear the following endorsements: the one for $37,500.00, "Pay to H. Beer or order, H. Kern & Son—Henry Beer;" the one for $2500.00, "Pay A. Lehman & Co., or order, H. Kern & Son; for deposit to the credit of A. Lehman & Co."

These checks were not drawn from the regular check book of Schwartz & Sons, but on loose checks furnished by Kern & Son and F. J. Dreyfous, the transaction taking place at the store of H. Kern & Son on Saturday night, Feby. 20, 1892, and A. Schwartz & Sons having no check book there. No entry of the checks or of the transactions was made on the books of H. Kern & Son up to the time they were closed, to-wit: Mar. 10 | 92.

The day following the fire, Feb. 18th, Schwartz & Sons opened a temporary office at the office of Mr. B. Neugass on Carondelet street, which was continued for four or five days, and bills due A. Schwartz & Sons were paid at that office on Monday, Feb. 22nd.

The stock of goods in the store of Kern & Son, while it had been somewhat reduced, was a considerable stock, as it is in evidence that the inventory books, without deductions, footed up over $50,000, and after the corrections, of errors, and the completion of the ascertainment of the value of the stock, it was found to amount to $47,002 or $7002.00 in excess of the amount stated in the agreement.

That the present suit was conducted and carried to judgment by the H. B. Claflin Co., unaided and unassisted by any of the other creditors of H. Kern & Son, or by their Syndic, and at the expense of the H. B. Claflin Co.

That the books of H. Kern & Son were offered in evidence and they failed to show any entry whatsoever of any sale to A. Schwartz & Sons, or of the receipt of any cash, check or other obligation, as resulting from the said sale of the 20th of February, 1892; nor do they make any reference

whatsoever to the transaction covered by the said agreement, although the books of H. Kern & Son show that they were posted up to March 10th, 1892.

That A. Schwartz & Sons opened the store for business not until on Monday, February 29th, 1892; that the whole stock of goods was sold by Schwartz & Sons, the disposition of them commencing on that day.

The findings made by the Court upon the motions for a new trial, which findings were filed Dec. 17, 1892, are made part of these findings.

The Court was requested by the plaintiffs to make the foregoing and other additional findings on Tuesday, May 2nd, 1893, at the time intervenors applied for their writ of error—the term at which the judgment was signed ended on April 22nd last; and the judgment herein was signed on the last day of said term.

These additional findings were presented by the plaintiffs and notice was given to the intervenors to whom they were submitted.

May 2, 1893.

(Signed) EDWARD C. BILLINGS, *Judge.*

Petition and order for writ of error. Filed May 2 | 93.

The H. B. Claflin Co.
vs.
H. Kern & Son, et als. } No. 12,059.

To the Hon. the Judges of the Court:

The petition of A. Schwartz & Sons, of and Mrs. Widow Abram Schwartz, Nathan I. Schwartz and Leon Schwartz, the individual members of said firm, duly made Intervenors herein, respectfully show:

That there are errors to their prejudice in the final judgment rendered herein April 21 | 93, and signed April 22 | 93, and in the record and proceedings thereof; as more fully specified in the assignment of errors presented herewith, and filed as part hereof, and they pray for a writ of error to review and reverse said judgment, returnable according to law to the United States Circuit Court of Appeals for the Fifth Circuit, within thirty days from the date hereof, and that the same operate as a supersedeas, on

petitioners giving bond and surety according to law, and for citation of the H. B. Claflin Co., plaintiffs, and H. Kern & Son, Henry Kern and Mrs. Henry Kern, defendants, and for general relief.

W. S. BENEDICT,
HOWE & PRENTISS,
ROUSE & GRANT,
Attys. for Petitioners above named, the Intervenors.

Let the prayer of the foregoing petition be granted, and let a writ of error be allowed as prayed for, returnable to the United States Circuit Court of Appeals for the Fifth Circuit, within thirty days from this date; and let the same operate as a supersedeas on the said petitioners, the Intervenors herein (plaintiffs in error), furnishing bond and surety according to law in the sum of one thousandd ollars.

(Signed) EDWARD C. BILLINGS, *Judge.*

May 2nd, 1893.

Assignment of Error. *Filed May 2 | 93.*

The H. B. Claflin Co.
vs.
H. Kern & Son,
A. Schwartz & Sons, Intervenors. } No. 12,059.

And now come the Intervenors herein, who pray for a writ of Error and assign the following errors in the final judgment rendered herein April 21, 1893, and signed April 22 | 93, to-wit:

1st. The Court, having found as a matter of fact, and as a conclusion of law, that the attachment issued herein was set aside and dissolved by the Insolvency and cession of the defendants in the cause, under the insolvent laws of Louisiana, in the State Court, No. 33,424, Civil District Court, Parish of Orleans, on the 8th December, 1892, erred in proceeding to adjudicate on the title of the Intervenors to the property seized under the said process of attachment.

2nd. The Court, having found the attachment herein was set aside and dissolved December 8 | 92, erred in not directing the delivery of the property attached to the Intervenors, from whose possession it was taken.

3rd. The Court, having found, as a matter of fact and law, that the attachment herein was dissolved and set aside

December 8 | 92, erred in assuming to decide on the title of the Intervenors to the property which had been seized under said attachment, when there was no longer any issue remaining in the cause as to such title.

4th. The Court erred in decreeing that the sale of their stock of merchandise, and the delivery thereof by the defendants, H. Kern & Son, to the intervenors, A. Schwartz & Sons, did not vest the title thereto in said intervenors. And the Court erred in dismissing their Intervention.

5th. The Court erred in decreeing that the agreement of February 20, 1892, herein, did not transfer to the Intervenors the property attached, so as to affect the rights of the plaintiffs as attaching creditors of the defendants herein.

6th. On the facts found and conclusions stated by the Court, and the motions pending in the record, the Court erred in not formally decreeing, in the Judgments, that the attachment was dissolved and set aside December, 1892, by the Insolvency and cession of the defendants in the cause in the Civil District Court for the Parish of Orleans, No. 33,424.

7th. The finding of facts having been made, and the Judgment therein having been rendered on the 21st day of April, 1893, and signed on the 22nd day of April, 1893, at and during the November term of the Circuit Court, which expired on the 22nd day of April, 1893, the Court erred in amending said finding of facts, and in finding additional facts, against the objections of the Intervenors after said term had passed, and ordering the same to be filed at the April term following, to wit., on the 2nd day of May, 1893.

And for these errors, and others apparent on the face of the record, the said intervenors pray that said judgment may be reversed and for general relief.

W. S. BENEDICT,
HOWE & PRENTISS,
ROUSE & GRANT,
Attorneys for Intervenors.

May 2 | 93.

Bond for Writ of Error. Filed May 2, 1893.

Know all men by the presents, That we, Mrs. Widow Abram Schwartz, Nathan I. Schwartz, Leon Schwartz, & A. Schwartz & Sons, as principals and Herman Neugass of New

Orleans, as surety, are held and firmly bound unto The H. B. Claflin Co., H. Kern & Son, Henry Kern, Mrs. Henry Kern, and each of them *in solido* in the full and just sum of One Thousand Dollars, to be paid to the said obligees and each of them and to each of their certain attorney, executors, and administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of May in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at a term of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, at New Orleans, in a suit depending in said Court, between The H. B. Claflin Co., plaintiffs, and H. Kern & Son, defendants, and A. Schwartz & Sons, Intervenors, No. 12,059, upon the Docket thereof, a judgment was rendered against the said Intervenors, as well as said defendants, and the said principal Obligors to this Bond, viz: Mrs. Abram Schwartz, Nathan I. Schwartz, Leon Schwartz and A. Schwartz & Son, having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Obligees, and each of them, citing and admonishing them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said principal obligors shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—
(Signed) J. D. ROUSE.

(Signed)
A. SHWARTZ & SONS [SEAL]
N. I. SHWARTZ [SEAL]
L. L. SHWARTZ [SEAL]
JULIE SHWARTZ, [SEAL]
Widow of A. Shwartz,
H. NEUGASS [SEAL]

Approved by—
(Signed) EDWARD C. BILLINGS, *Judge.*
May 2nd, 1893.

Original.

United States of America, *ss.*

The President of the United States,

To the Honorable the Judges of the Circuit Court of the United States for the Fifth Circuit Court and Eastern District of Louisiana at New Orleans—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The H. B. Claflin Co., plaintiffs, and H. Kern & Son, Henry Kern and Mrs. Henry Kern, defendants; and A. Schwartz & Sons, composed of Mrs. Abram Schwartz, Nathan I. Schwartz and Leon Schwartz, intervenors, No. 12,059, upon the Docket of said Court, a manifest error hath happened, to the great damage of the said Intervenors, A. Shwartz & Sons, and Mrs. Abram Schwartz, Nathan I. Schwartz and Leon Schwartz, the individual members of said firm of A. Schwartz & Sons, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 2nd

[SEAL] day of May, in the year of our Lord one thousand eight hundred and ninety-three.

E. R. HUNT,
Clerk of the U. S. Circuit Court, Eastern Dist. of La.

May 2, 1893. Allowed by:

EDWARD C. BILLINGS, *Judge.*

Endorsed: Writ of error. No.——, U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed May 2, 1893. E. R. Hunt, Clerk.

United States of America, ss.
The President of the United States,
To The H. B. Claflin Co., H. Kern & Son, Henry Kern, Mrs. Henry Kern, and each of them—Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, at New Orleans, wherein Mrs. Widow Abram Schwartz, Nathan I. Schwartz and Leon Schwartz, composing the firm of A. Schwartz & Sons, and said firm of A. Schwartz & Sons, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United
[SEAL] States, this 2nd day of May, in the year of our Lord one thousand eight hundred and ninety-three. EDWARD C. BILLINGS, *Judge.*

On this 6 day of May, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared J. R. Pennigre, Dy. Marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Mrs. Henry Kern, by leaving the same at her domicile in New Orleans, La., in the hands of her husband,

Henry Kern, a person apparently above the age of 14 years, at and residing at the domicile of Mrs. Henry Kern, who informed me that the said Mrs. Henry Kern was in her room, and could not be seen, but that he would hand the same to her.

Sworn to and subscribed, the ninth day of May, A. D. 1893.

JAS. R. PENNIGRE,
Dy. U. S. Marshal.

E. R. HUNT, *Clerk.*

Service of citation accepted, May 5 | 93.

LAZARUS, MOORE & LEMLE,
Attys. for The H. B. Claflin Co., Defts. in Error.

PERCY ROBERTS
AND BERNARD TITCHE,
Attorneys for H. Kern & Son and Henry Kern, defendants in Error.

Endorsed: Received by U. S. Marshal, New Orleans, La., May 6 | 93. No. 12,059. U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Citation. Filed May 9, 1893. E. R. Hunt, Clerk.

Bill of Exception. Filed May 5 | 93.

The H. B. Claflin Co.
vs.
H. Kern & Son. } No. 12,059.

Intervention of A. Schwartz & Sons.

Be it known and remembered, that on and during the progress of the trial hereof, counsel for H. Kern & Son offered in evidence a copy, certified to by the Clerk of the Civil District Court for the Parish of Orleans, of certain proceedings had in, and orders obtained from, the said Civil District Court for the Parish of Orleans, to show, as was contended for by counsel for H. Kern & Son, the cession of the property of the said defendants to their creditors on the 8th day of December, 1892.

Whereupon, counsel for The H. B. Claflin Co. objected to the introduction of the said evidence.

First.

Because the said H. Kern & Son, if indeed they had made any such cession as is pretended, could not be per-

mitted to urge the same; the syndic alone being the only person authorized by law to interpose any such plea.

Second.

Because, even if the said alleged bankrupts, H. Kern & Son, can be permitted to plead the said cession, they have not filed any special plea, exception, answer or other document, specially and specifically setting up said cession.

Third.

Because (A) the document tendered in evidence does not purport to contain, and, in truth, does not contain, all and every the proceedings had, documents filed, and orders obtained, in the matter of H. Kern & Son vs. their creditors, begining with their petition praying for a respite, in July, 1891, and all proceedings had therein, and papers and documents filed and proceedings subsequently had; and (B) because the said record is not duly certified or exemplified, according to the act of Congress providing for the exemplification of records from other courts:

The Court having overruled the said objections, and permitted the said H. Kern & Son to file the said document, counsel for The H. B. Claflin Co. excepted to the ruling of the Court and with leave of the Court, reserve this their bill of exceptions thereto; which they now tender to the Court for signature. Which is signed accordingly.

EDWARD C. BILLINGS, *Judge.*

Certified copy of Proceedings in the Cession of Property of H. Kern & Son, referred to in Bill of Exceptions. Copied at pages 57-77 of Transcript.

Bill of Exceptions. Filed May 5 | 93.

The H. B. Claflin Co.
vs.
H. Kern & Son.
A. Schwartz & Sons, Intervenors.
} No. 12,059.

Be it known and remembered, that on the 3rd day of March, 1893, after the trial, argument, and submission of this cause, counsel for defendants, H. Kern & Son, presented to the Court a paper denominated and styled, "Motion and Suggestion of Defendants to Dissolve Attachment," and asked leave of Court to file the same; where-

upon, counsel for the plaintiffs, the H. B. Claflin Co., objected to the filing or consideration of said paper for the reasons:

1st. Because the said paper or document is neither motion, exception, plea or answer, nor any legal document known to the practice, but is a mere suggestion of no more force and effect than if orally made.

2nd. Because the defendants, H. Kern & Son, if indeed they had made any cession, as is suggested in said paper, cannot be permitted to urge the same; the syndic being the only person permitted by law to either suggest or plead same.

3rd. Because inasmuch as the instant case had already been tried, argued and submitted, the filing of any such alleged "Motion and Suggestion" was not now permissible.

Whereupon the Court took the application of counsel for H. Kern & Son to file said paper, under advisement, and did, subsequently, to-wit: on the 21st day of April, 1893, order and direct said paper to be filed, whereupon counsel for the H. B. Claflin Co., plaintiffs herein, then and there excepted to the ruling of the Court, for the reasons as hereinabove set forth, and by leave of Court then and there obtained, reserved this their Bill of Exceptions to said ruling, which said Bill of Exceptions is now tendered to the Court for its signature.

Which is signed accordingly.

EDWARD C. BILLINGS, *Judge.*

Motion and Suggestion of Defendants to Dissolve Attachment. Referred to in Bill of Exceptions, copied at page 130 of Transcript.

Bill of Exceptions. Filed May 5 | 93.

The H. B. Claflin Co
vs.
H. Kern & Son. } No. 12,059.

Intervention of A. Schwartz & Sons.

Be it known and remembered, that on and during the progress of the trial hereof of H. Kern & Son, defendants, by their counsel, suggested to the Court that they had, on the 8th of December, 1892, made a voluntary cession,

under the insolvent laws of the State of Louisiana, of all their property to their creditors, and urged that, as such alleged bankrupts, they be permitted and allowed to plead and urge said alleged cession in bar of plaintiff's action herein:

Whereupon, counsel for The H. B. Claflin Co. opposed the said suggestion, on the ground and for the reason, that if the said H. Kern & Son had in fact made any cession of their property under the insolvent laws of this state, then, and in that case, no one could be permitted to file and urge such plea or exception save and except the duly appointed provisional or definitive syndic; and that such a plea, if successful, inured solely to the benefit of the creditors of H. Kern & Son, and that only the representative of the said H. Kern & Son—to-wit., the syndic—if in truth, said H. Kern & Son had made any such cession,—could be permitted to plead the same:

The Court having overruled this objection, and having decided, that the said H. Kern & Son could be allowed to plead the cession, if any such had been made, counsel for plaintiffs, The H. B. Claflin Co., by leave of the Court first had excepted to the ruling of the Court, and reserve this their Bill of Exceptions thereto, which they now tender to the Court for signature. Which is signed accordingly.

EDWARD C. BILLINGS, *Judge.*

Assignment of Errors by H. Kern & Son. Filed May 26th, 1893.

The H. B. Claflin Company *vs.* H. Kern & Son. A. Schwartz & Sons, Intervenors.	No. 12,059. U. S. Circuit Court, 5th Circuit and Eastern District of Louisiana.

And now come H. Kern & Son, and Henry Kern, individually, and as surviving partner of H. Kern & Son, and impleaded as an heir and representative of Emile Kern, deceased, and Mrs. Henry Kern, impleaded as an heir and representative of said Emile Kern, deceased, by their Attorneys, and say that manifest error to their prejudice hath intervened in the record of, and the proceedings had, in the above entitled cause, and assign the following errors,

praying in that behalf the writ of error for the correction thereof:

I.

The Court erred in rendering any judgment against Mrs. Henry Kern and against Henry Kern, as heirs of Emile Kern, or as legal representatives of Emile Kern, inasmuch as they were as such heirs never made parties to these proceedings.

II.

The Court erred in rendering any judgment against said Mrs. H. Kern, as heir or legal representative of said Emile Kern, because there were no proceedings conducted contradictorily with her, in this cause.

III.

The Court erred in rendering judgment against said H. Kern and said Mrs. H. Kern as one of the heirs or legal representatives of Emile Kern, because no evidence whatever was offered, nor is there any evidence whatever in the record, to show or establish that said Mrs. Kern is the heir or one of the heirs of said Emile Kern, or that she is the legal representative of said Emile Kern, or has in any manner accepted his succession.

IV.

The Court erred in rendering judgment against said Mrs. Henry Kern, as heir or legal representative of Emile Kern, because plaintiff does not allege that she is the succession representative of Emile Kern or that she has accepted his succession.

V.

The Court erred in rendering judgment against said Mrs. H. Kern, *in solido*, with H. Kern & Son and H. Kern and Emile Kern, because, if sued as the heir, she could under no circumstances be condemned for more than her virile share.

VI.

The Court erred in rendering a judgment against said Mrs. H. Kern as heir or legal representative of Emile Kern, because she could under no circumstances be responsible for more than a virile share, and there is no evidence to show the number of heirs.

VII.

The Court erred in rendering any judgment against Mrs. H. Kern as heir or legal representative of Emile Kern, because no jury was impanneled to render a verdict, nor did she appear in said cause, nor was there any waiver of any jury.

VIII.

The Court erred in rendering any judgment in the cause, either against the said Mrs. Kern, or against the firm of H. Kern & Son, by reason of the failure to make the succession of said Emile Kern, or the legal representatives of said Emile Kern, parties; and by reason of the failure of the plaintiff to procure a waiver of a Jury, in consequence thereof the entire judgment is a nullity.

And for these and other errors apparent in the face of the record the said defendants, applying for a writ of error, pray that the said final judgment may be reversed and plaintiff's suit be dismissed, and for costs and general relief.

(Signed) PERCY ROBERTS,
BERNARD TITCHE,
Attys. for Plaintiffs in error.

Petition and Order for Writ of Error. Filed May 26, 1893.

The H. B. Claflin Co. *vs.* H. Kern & Son. A. Shwartz & Sons, Intervenors. } No. 12,059. U. S. Circuit Court, 5th Circuit and Eastern District of Louisiana.

To the Honorable United States Circuit Court in and for the Fifth Circuit and Eastern District of Louisiana:

The petition of H. Kern & Son, and of Henry Kern, individually and as surviving partner of H. Kern & Son, and impleaded as an heir and representative of Emile Kern, deceased; and of Mrs. Henry Kern, impleaded as an heir, and representative of said Emile Kern, deceased, shows with respect:

That there is error to their prejudice in the judgment of the Court signed on April 22d, 1893, in the above cause, and that they feel aggrieved thereby, and pray a writ of error to review and reverse said judgment returnable according to law to the United States Circuit Court of Ap-

peals for the Fifth Circuit at New Orleans, Louisiana, within Thirty days or according to law, its assignment of errors having been filed with the Clerk of said Circuit Court, and they herewith tender their bond for approval.

(Signed) PERCY ROBERTS,
and BERNARD TITCHE,
Attys. for plaintiffs in error.

Order.

Let the prayer of the foregoing petition be granted and let a writ of error be allowed as prayed for, returnable to the United States Circuit Court of Appeals for the Fifth Circuit within Thirty days from this date on the petitioner herein furnishing bond and surety according to law in the sum of Five hundred dollars.

May 26, 1893.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bond for Writ of Error. Filed May 26th, 1893.

Known all men by these presents, That we, H. Kern & Son, and Henry Kern and Mrs. Henry Kern, plaintiffs in error, as principals, and Samuel Dalsheimer and Solomon Kuhn, as sureties, are held and firmly bound unto The H. B.. Claflin Company, as well as to A. Schwartz & Sons, intervenors, and to Mrs. Widow Abram Schwartz, Nathan I. Schwartz and Leon Schwartz, composing said firm of A. Shwartz & Sons, and to each of them, in the full and just sum of Five hundred dollars, to be paid to the said H. B. Claflin Co. and to said A. Schwartz & Sons and to Mrs. Widow Abram Shwartz, Nathan I. Shwartz and Leon Shwartz, composing said firm of A. Shwartz & Sons, and to each of them and their and each of their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22d day of May in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at a session of the United States Circuit Court for the Fifth Circuit and Eastern District of Louisiana, in a suit depending in said Court, between The H. B. Claflin Company, plaintiff, and H. Kern & Son, and Henry Kern, individually and as surviving partner of H. Kern & Son and impleaded as an heir and representative of Emile Kern, deceased, and Mrs. Henry Kern, impleaded as an heir and representative of said Emile Kern, A. Schwartz and Sons, composed of Widow Abram Shwartz, Nathan I. Shwartz and Leon Schwartz, intervenors, a final judgment was rendered against the said "H. Kern & Son and *in solido* against Henry Kern and against the legal heirs and representatives of Emile Kern, made parties in said cause," and the said Henry Kern and Mrs. Henry Kern and H. Kern & Son, as above described, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said H. B. Claflin Company and A. Shwartz and Sons and Mrs. Widow Abram Shwartz, Nathan I. Shwartz and Leon Shwartz, composing said firm of Intervenors, citing and admonishing them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said H. Kern & Son and Henry Kern and Mrs. Henry Kern aforesaid shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) WID. HENRY KERN, [SEAL]
H. KERN, [SEAL]
S. DALSHEIMER, [SEAL]
S. KUHN.

Approved by—
(Signed) EDWARD C. BILLINGS, *Judge.*
May 20, 1893.

State of Louisiana, }
Parish of Orleans. }

S. Kuhn, being duly sworn, deposes and says, that all his

debts and liabilities being paid and satisfied, he is well worth the sum of Five hundred dollars.

(Signed) S. KUHN.

Sworn to and subscribed before me this 22d May, 1893.

[SEAL] (Signed) F. J. DREYFOUS,
Not. Pub.

United States of America, *ss.*

The President of the United States,

To the Honorable the Judges of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, at New Orleans—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The H. B. Claflin Co., plaintiff, and H. Kern & Son, and Henry Kern, individually and as surviving partner of H. Kern & Son and impleaded as an heir and representative of Emile Kern, deceased, and Mrs. Henry Kern, impleaded as an heir and representative of said Emile Kern, defendants, and A. Schwartz & Sons, composed of Widow Abram Schwartz, Nathan I. Schwartz and Leon Schwartz, Intervenors, No. 12,059 of the Docket of said Court, a manifest error hath happened, to the great damage of the said H. Kern & Son and Henry Kern, and Mrs. Henry Kern, as aforesaid, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 26th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL]

E. R. HUNT,
Clerk of the U. S. Circuit Court, Eastern District of La.

Allowed by:

EDWARD C. BILLINGS, *Judge.*

Endorsed: No. 12,059. U. S. Circuit Court. The H. B. Claflin Co. vs. H. Kern & Son. Filed May 26, 1893. E. R. Hunt, Clerk.

United States of America, *ss.*
The President of the United States,

To The H. B. Claflin Company, and to A. Schwartz and Sons, Mrs. Widow Abram Schwartz, Nathan J. Schwartz and Leon Schwartz—Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, wherein H. Kern and Son and Henry Kern, individually, and as surviving partner of H. Kern and Son, and impleaded as an heir and representative of Emile Kern, deceased, and Mrs. Henry Kern, impleaded as an heir and representative of said Emile Kern, plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 26th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL]

EDWARD C. BILLINGS, *Judge.*

On this 27 day of May, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared T. S. Delony, Dy. Marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Nathan I. Shwartz, by handing the same to him in person, in N. O., La. T. S. DELONY.

Sworn to and subscribed, the 30th day of May, A. D. 1893. H. J. CARTER, *U. S. Commissioner.*

No. —— U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed May 30, 1893. E. R. Hunt, Clerk.

Endorsed: U. S. Circuit Court. 12,059. H. B. Claflin Co. vs. H. Kern & Son. Citation. Received by U. S. Marshal, New Orleans, La., May 27 | 93.

United States of America, *ss.*
The President of the United States,

To The H. B. Claflin Company and to A. Schwartz and Sons, Mrs. Widow Abram Schwartz, Nathan J. Schwartz, and Leon Schwartz—Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, wherein H. Kern and Son, and Henry Kern, individually and as surviving partner of H. Kern and Son, and impleaded as an heir and representative of Emile Kern, deceased, and Mrs. Henry Kern, impleaded as an heir and representative of said Emile Kern, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United
[SEAL] States, this 26th day of May, in the year of

our Lord one thousand eight hundred and ninety-three.

EDWARD C. BILLINGS, *Judge.*

On this 27 day of May, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared T. S. Delony, Dy. U. S. Marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Widow A. Schwartz, by leaving the same at her domicile, in New Orleans, La., in the hands of Edwin Newgass, a person apparently above the age of 14 years, at and residing at the domicile of Widow A. Schwartz; and who informed me that she was not at home at the time of said service. T. S. DELONY.

Sworn to and subscribed the 30th day of May, A. D. 1893.

H. J. CARTER, *U. S. Commissioner.*

No. ——, U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed May 30, 1893. E. R. Hunt, Clerk.

Endorsed: U. S. Circuit Court. 12,059. H. B. Claflin Co. vs. H. Kern & Son. Citation. Received by U. S. Marshal, New Orleans, La., May 27 | 93.

United States of America, *ss.*

The President of the United States,

To The H. B. Claflin Company and to A. Schwartz & Sons, Mrs. Widow Abram Schwartz, Nathan I. Schwartz and Leon Schwartz—Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, wherein H. Kern & Son, and Henry Kern, individually, and as surviving partner of H. Kern & Son, and impleaded as an heir and representative of Emile Kern, deceased, and Mrs. Henry Kern, impleaded as an heir and representative of said Emile Kern, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the Judgment rendered against the said plaintiff in error, as

in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 26th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

EDWARD C. BILLINGS, *Judge.*

On this 27 day of May, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared T. S. Delony, Dy. Marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to A. Schwartz & Sons, by handing the same to Nathan I. Schwartz, a member and manager of the firm of A. Schwartz & Sons, in person, in the City of New Orleans. T. S. DELONY.

Sworn to and subscribed the 30th day of May, A. D. 1893. H. J. CARTER, *U. S. Commissioner.*

No. —— U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed May 30, 1893. E. R. Hunt, Clerk.

Endorsed: U. S. Circuit Court. 12,059. H. B. Claflin Co. vs. H. Kern & Son. Citation. Received by U. S. Marshal, New Orleans, La., May 27 | 93.

United States of America, *ss.*
The President of the United States,

To The H. B. Claflin Company and to A. Schwartz & Sons, Mrs. Widow Abram Schwartz, Nathan I. Schwartz and Leon Schwartz—Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, wherein H. Kern & Son and Henry Kern, individually, and as surviving partner of H. Kern & Son, and impleaded as an heir and representative of Emile Kern, deceased, and Mrs.

Henry Kern, impleaded as an heir and representative of said Emile Kern, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 26th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

EDWARD C. BILLINGS, *Judge.*

On this 27 day of May, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared T. S. Delony, Dy. Marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Leon L. Schwartz, by handing the same to him in person, in New Orleans, La.

T. S. DELONY.

Sworn to and subscribed the 30th day of May, A. D. 1893.

H. J. CARTER,
U. S. Commissioner.

No. ——. U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed May 30, 1893. E. R. Hunt, Clerk.

Endorsed: U. S. Circuit Court. 12,059. H. B. Claflin Co. vs. H. Kern & Son. Citation. Received by U. S. Marshal, New Orleans, La., May 27 | 93.

United States of America, *ss.*
The President of the United States.

To The H. B. Claflin Company, and to A. Schwartz & Sons, Mrs. Widow Abram Schwartz, Nathan I. Schwartz and Leon Schwartz—Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States

for the Fifth Circuit and Eastern District of Louisiana, wherein H. Kern & Son and Henry Kern, individually, and as surviving partner of H. Kern & Son, and impleaded as an heir and representative of Emile Kern, deceased, and Mrs. Henry Kern, impleaded as an heir and representative of said Emile Kern, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the Judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 26th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

EDWARD C. BILLINGS, *Judge.*

On this 27 day of May, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared T. S. Delony, Dy. U. S. Marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to The H. B. Claflin Co., by handing same to Judge H. L. Lazarus, Counsel for said firm, in person, in the City of New Orleans.

T. S. DELONY.

Sworn to and subscribed the 30th day of May, A. D. 1893. H. J. CARTER, *U. S. Commissioner.*

No.——. U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed May 30, 1893. E. R. Hunt, Clerk.

Endorsed: No. 12,059. H. B. Claflin Co. vs. H. Kern & Son. Citation. Received by U. S. Marshal, New Orleans, La., May 27 | 93.

United States of America,
Circuit Court of the United States,
Fifth Circuit and Eastern District of Louisiana.
Clerk's Office:

I, Edward R. Hunt, Clerk of the Circuit Court of th United States, for the Fifth Circuit and Eastern District of

Louisiana, Do Hereby Certify, That the foregoing 157 pages contain and form a full, complete, true and perfect transcript of the Record, bills of exceptions, assignments of error and all Proceedings had, in the case of The H. B. Claflin Co. vs. H. Kern & Son, A. Shwartz & Sons, Intervenors; No. 12,059 of the Docket of the said Court.

Witness my hand and the seal of said Court, at the City of New Orleans, this 30th day of May, A. D. 1893.

[SEAL] E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States Judge for the Eastern District of Louisiana, do certify, that Edward R. Hunt, whose name is signed to the above certificate as Clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, was, at the time of signing said certificate, and is now the Clerk of said Court: That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such Clerk.

Given under my hand, at the City of New Orleans, in said district, this 30th day of May, A. D. 1893.

EDWARD C. BILLINGS, *Judge.*

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No.

EX PARTE THE H. B. CLAFLIN COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The H. B. Claflin Co., a corporation created under the laws of the State of New Jersey and a citizen of said State, with respects represents:

That it is now and has been, since its organization as a corporation, engaged in commercial pursuits, transacting business with merchants and corporations residing and doing business in the various States of this Union; that, in the conduct of its business, it did, from time, to time, during the years 1890 and 1891, sell and deliver at prices agreed upon, goods, wares and merchandise to the commercial firm of H. Kern & Son, then composed of Henry Kern and Emile Kern, both of whom were residents of the City of New Orleans and State of Louisiana; and that the said business so transacted between your petitioner and the

said H. Kern & Son, during the time aforesaid, created an indebtedness from said H. Kern & Son to your petitioner in the full sum of twenty-one thousand seven hundred and twenty-two dollars ($21,722); said indebtedness in part being evidenced by the promissory notes and obligations of said Kern & Son, and part open accounts admitted to be justly due and owing to your petitioner.

Petitioner further represents that part of the indebtedness aforesaid was due in the month of January, 1892, and demand was made for the payment thereof; that your petitioner was advised that said H. Kern & Son, then conducting business in the City of New Orleans, as aforesaid, were about to make a fraudulent disposition of their property, with the purpose and intent of defrauding your petitioner, and, in furtherance of said purpose, had entered into negotiations with the firm of A. Shwartz & Sons, citizens of the State of Louisiana and residents of the City of New Orleans, by and under which negotiations the said Shwartz & Sons were to buy the entire stock in trade of said Kern & Son, the said Shwartz & Sons being then fully advised of the indebtedness due by said Kern & Son to your petitioner, and being further advised by the public records of the courts of the State of Louisiana, that said Kern & Son had, prior to the date of the said negotiations, applied to the said courts, under the laws prevailing in the State of Louisiana, for a respite for the payment of their debts; that they had obtained the same from their creditors, and, under said respite, were enjoying an extension of six, twelve and eighteen months within which to discharge their indebtedness to their creditors.

That said negotiations were conducted by the debtors of

your petitioner, to-wit: H. Kern & Son and A. Shwartz & Sons, as aforesaid, with the view, purpose and intent of defrauding the creditors of said firm of Kern & Son, and particularly your petitioner; that, as soon as your petitioner was advised of the said negotiations, and the dishonest and fraudulent purpose thereof, and prior to the consummation of said negotiations, and the sale by said Kern & Son of their stock of merchandise to said Shwartz & Sons, your petitioner, exercising its rights under the laws of the State of Louisiana, authorizing the issuance of the writ of attachment to prevent the fraudulent disposition of a debtor's property, and to conserve it until the final rendition of a judgment upon the maturity of the debt (the said laws authorizing the writ whether the debt be due and exigible at the time of the application for the writ or not) did, on the 22d of February, 1892, upon proper averments made, and upon complying with all the statutory requirements under the laws of Louisiana, apply, in a cause properly constituted, because of the citizenship of the respective parties to the litigation, to the Honorable the Circuit Court of the United States for the Fifth Circuit, sitting in the Eastern District of Louisiana, for a writ of attachment, and thereunder for process of garnishment, directed against said Kern & Son, and their property, rights and credits within the jurisdiction of said Court; that, upon the said application of your petitioner, it having made, through its agent, the requisite statutory affidavit and furnished bond conditioned as the law directs, a writ of attachment issued; that the same was, through the marshal of the district, made operative upon the property, rights and credits of said H. Kern & Son; and that said marshal did

take into his possession and hold, under said writ, and subject to the orders of Court, the property, rights and credits of said Kern & Son, which property your petitioner represents and avers to have been of a value sufficient to have satisfied in full its demand with interest and all costs incident to the prosecution and enforcement of its claim, all of which will more fully and at large appear by reference to the petition filed in the cause, the affidavit and bond attached thereto, and the order of the presiding Judge issued in conformity to law and endorsed upon said petition; a copy of which is hereto annexed, and, for greater certainty, made part hereof, and in any particular in which the necessary averments are not contained herein, said exhibit is to be read into this petition as if set forth *in extenso*.

Your petitioner further represents that, immediately upon the writ of attachment hereinbefore referred to becoming operative upon the property of said Kern & Son, and the custody thereof being in the Marshal, under said writ, the said A. Shwartz & Sons, in furtherance of the fraudulent combination entered into between them and the said Kern & Son, appeared in the cause of your petitioner against Kern & Son, and filed therein what is known and designated, under the practice prevailing in the courts of the State of Louisiana, as a petition of intervention, in which the said A. Shwartz & Sons averred that the property attached and seized under the writ of attachment obtained by your petitioner as aforesaid, was their property, and not subject to the operation of your petitioner's writ, and that the title to said property was in them, they having acquired the same by purchase from Kern & Son, and being

in the actual physical possession of the same prior to the operation of the writ as aforesaid; and that, exercising their rights under the Statute law of the State, they desired to release the writ operating on said property, by giving bond conditioned that, in the event they should fail to make good their title to said property, they would produce the same in order to satisfy such judgment as might be rendered against Kern & Son and in favor of your petitioner, or, upon default of producing said property, that they would pay whatever judgment was rendered in favor of your petitioner against said Kern & Son; that said petition containing all the necessary statutory averments, the Judge of said Circuit Court, as a matter of course and of right, authorized and directed the Marshal to release the attachment, upon the intervenors giving bond in the sum of twenty-two thousand dollars; all of which will more fully and at large appear by reference to the petition of intervention filed in the cause, and the order of the Judge entered thereon, a certified copy of which is hereto annexed, and, for greater certainty, made part hereof.

Your petitioner further represents, that the said A. Shwartz & Sons, taking advantage of the *ex parte* order directing the release of the attachment, upon the execution of bond, made out a bond which they well knew was of no force, virtue, or effect, and, by their practice in this respect, obtained possession of the property theretofore held under the operation of the writ of attachment sued out by your petitioner, as aforesaid; that, thereupon, the Court being advised of the action of the said A. Shwartz & Sons in the furtherance of their combination conspiracy with the said Kern & Son to defraud the creditors of said

Kern & Son and your petitioner, the said Court vacated the said order to bond and directed that said Shwartz & Sons should give bond for a sum conditioned as the law directs; that, thereupon, the said Shwartz & Sons did furnish bond for an amount less than the law directs (the said sum being reduced by consent of counsel), but for an amount sufficient to satisfy your petitioner's demand, with interest and all costs, the said bond being reduced from the statutory amount to the amount of thirty-five thousand dollars, conditioned, however, as directed by law; and that, upon the execution of said bond by said A. Shwartz & Sons, the Marshal of said Circuit Court, under its direction and order, released the property held under said writ, the said bond being substituted for said property, and assigned the bond aforesaid, in accordance with the statutory direction, to your petitioner, the plaintiff in said suit and writ; all of which will more fully and at large appear by a certified copy of the petition of intervention, the order thereon, the bond given thereunder, the motion to vacate the bond and reinstate the writ of attachment, the order of Court thereon, and the substitution of the new bond with the endorsement thereon to your petitioner; all of which is hereto annexed, and, for greater certainty, made part hereof.

Petitioner further represents that, under the statute law of the State of Louisiana, the jurisprudence of the Supreme Court of the State, and the practice of the Courts therein, writs of attachment are dissolved, 1st, upon the successful traverse by the defendant in writ of the averments of fact upon which the writ issued, the grounds for the issuance of the writ being specifically provided for in Article 240 of the Code of Practice of the State of

Louisiana; 2d, where the bond required in the obtention of the writ is not such as the statute requires, nor conditioned as the law directs; 3d, where the surety on the bond has not the qualifications required by law or where the bond is, in other respects, not sufficient; and, 4th, where the affidavit required by statute, prior to the issuance of the writ, is informal and defective, or not in compliance with the statutory requirements.

That the above enumerated causes are the only causes known to the law, jurisprudence, or practice of the State of Louisiana by which a writ of attachment can be dissolved; that attachments may be released by the defendant giving bond to produce the property to meet the final judgment, or in default thereof, to pay the judgment; or the writ may by released by the intervention of a third person asserting title and ownership to the property attached and giving bond conditioned to establish title in himself as intervenor, or, in default thereof, to produce the property to meet the judgment that may be rendered in the case against the defendant, or, in the alternative, to pay the judgment rendered in the case.

Petitioner represents that, immediately upon the release of the property attached, upon the intervention of A. Shwartz & Sons, and the bonding of said attachment, the said defendants, Kern & Son, under the practice prevailing in the Courts of Louisiana by virtue of statutory provision (Art. 258 Code of Practice) moved, through their counsel, to dissolve the writ of attachment issued against them in the case of The H. B. Claflin Co. vs. H. Kern & Son, and, in their motion to dissolve, urged every ground known to the law, jurisprudence and practice of the Court to dissolve

said writ; all of which will more fully and at large appear by reference to a certified copy of the motion to dissolve filed in the case by said H. Kern & Son, hereto annexed and made part hereof.

Petitioner represents that, to the petition of intervention of A. Shwartz & Sons asserting title and ownership to the property attached as the property of H. Kern & Son, the said H. B. Claflin Co. denied title of A. Shwartz & Sons, and averred that the property attached and held under the writ was, at the time, the property of Kern & Son, and liable for the payment of their debts, including the debt due to your petitioner.

Petitioner further represents that the motion on the part of H. Kern & Son to dissolve the writ of attachment was fixed for hearing for April 8th, 1892, and, upon being called for trial in the Circuit Court of the United States, a jury was duly impannelled to hear the evidence and decide whether the plaintiffs had complied, in all respects, with the statute law of the State of Louisiana in obtaining the writ of attachment, and whether the facts, as charged in plaintiff's petition for attachment, to-wit: an attempted fraudulent disposition of the property to the prejudice of the petitioner, was true or not; that the said cause was tried from day to day and testimony administered as to the truthfulness and alleged falsity of the averments; that, after the presentation of the said cause and the charge of the Judge on the law in the case, the same was given in charge to the jury for their verdict, and that they did, on April 27th, 1892, render a verdict in favor of the H. B. Claflin Co. and against H. Kern & Son, in the words and figures as follows, to-wit:

"New Orleans, La., April 27th, 1892.

"We, the Jury, find a verdict in favor of plaintiff, H. B. Claflin & Co., against the defendants, H. Kern & Son.

"JOS. A. GAUCHE, Foreman."

And the jurors were discharged from further consideration of said case; all of which will more fully and at large appear by reference to a certified copy of the minute entries of the Court, showing the trial of the case from day to day and the verdict rendered as hereinabove recited, all of which are hereto annexed, and, for greater certainty, made part thereof.

Your petitioner further represents that, within the legal delays, the said Kern & Son applied by motion to the said Circuit Court to grant a new trial on their motion to dissolve the attachment, setting out at large the errors of which they complained; all of which will more fully and at large appear by reference to a certified copy of said motion for a new trial, hereto annexed and made part hereof; that the said application for a new trial was submitted to the Court, and, upon consideration thereof, the same was refused.

Petitioner represents that to the main or primary action of petitioner against Kern & Son, the debt for which suit was brought being, at the time of the institution of the proceedings, unmatured, the said Kern interposed a plea of prematurity, and thereby delayed your petitioner in having debt recognized and in obtaining judgment thereon; that, at the maturity of petitioner's debt, and upon its application, the said plea of prematurity was overruled and the defendants ordered to answer over; that thereupon—to-wit., on Nov. 28th, 1892—the said H. Kern & Son, de-

fendants, answering to the action, reserved all their rights to sue for damages for the alleged unwarranted and illegal attachment, and plead to the main action the general issue, as will more fully appear by their answer, a certified copy of which is hereto annexed, and, for greater certainty, made part hereof.

That, immediately upon the filing of the answer of said defendants, Kern & Son, your petitioner moved to set said cause down for hearing upon the primary action, in order that your petitioner might have recognition of its debt by the judgment of the said Circuit Court; that the said cause was ordered to be heard on Dec. 6th, 1892, and the parties to said cause duly notified thereof; that the said cause was regularly called for trial, by the Judge presiding in said Circuit Court, on the 6th of December, 1892, and, in accordance with law, a jury was duly impanelled and sworn to hear and determine the cause between The H. B. Claflin Co. and H. Kern & Son; and that, after proof was administered in support and affirmance of the plaintiff's demand, accompanied by the finding of the former jury, upon the writ of attachment and its justification, the said jury was duly charged by the Court as to the law, and a verdict found in favor of The H. B. Claflin Co., recognizing its debt for the amount claimed, with interest and costs and the privilege of attachment, the said verdict being in the words and figures following, to-wit:

"New Orleans, La., Dec. 6th, 1892.

"We, the jury, find a verdict for plaintiffs, H. B. Claflin & Co., against the defendants, in the sum of $21,728.00, with legal interest from maturity, as claimed in the petition, and privilege of attachment.

"MARSHAL GOSSELIN, Foreman."

That thereupon it was ordered by the Court that the verdict be recorded and the same made the basis of the judgment to be entered in the cause in the said Court, and that an unsuccessful attempt was made, upon the part of said H. Kern & Son, to obtain a new trial on the verdict thus rendered; all of which will more fully and at large appear by the record in the cause, a certified copy of which is hereto annexed, and, for greater certainty, made part hereof.

Petitioner further represents, that the trial of the case between it and the said Kern & Son did not affect or determine the rights of A. Shwartz & Sons, the intervenors, as to their title or ownership to the property upon which the said writ of attachment was operative, or affect or determine their liability upon said bond given to release the said property attached; the question of title as between Shwartz & Sons and the plaintiff, the attaching creditor, to be determined in a separate trial.

Your petitioner represents, that, upon the trial of the rule by Kern & Son to dissolve the attachment, as heretofore recited, the said A. Shwartz & Sons, in furtherance of the combination and conspiracy entered into between them and said Kern & Son, assisted in the trial of the said rule to dissolve, and were, with their counsel, constantly present during the trial, aiding and assisting the said Kern & Son in their efforts to set aside and vacate the attachment which your petitioners ran in order to conserve the property of their debtor until the rendition of judgment in the cause; that, if they were *bona fide* purchasers of the property of the said Kern & Son, as averred by them, and if they were in possession of said property at the time the

writ was operative upon the same, they were without interest in defeating the attachment, which was directed solely against Kern & Son, and which could not, in any manner, affect the rights, property or credits of said Shwartz & Sons.

Petitioner represents, that having failed to effect the release or dissolution of the writ of attachment issued in the cause, and the said Shwartz & Sons knowing full well that, at the time of the operation of said writ, they had no title whatever to said property, and that the same was subject to the payment of the debts of Kern & Son, and that the said writ, in effect, defeated the fraudulent combination and conspiracy into which they had entered with said Kern & Son, advised the said Kern & Son, and, in concert with them, resorted to all delays to retard and defeat your petitioner in the obtention of judicial recognition of its debt; that they, by their concerted action, delayed your petitioner until December 6th, 1892, and then, being advised that further delay was impossible, and that the property attached, if at the time the property of Kern & Son, was subject to the writ of your petitioner, and being further advised that, under the Statute law of the State of Louisiana, three judicial days must elapse from the rendition of the judgment before the signature of the Judge in verification thereof, the said Kern & Son, upon the suggestion of said Shwartz & Sons, and taking advantage of a system of laws for honest but unfortunate debtors, made a cession of their property under the laws of the State of Louisiana, believing that the effect of a surrender under the State insolvent laws would be to dissolve all attachment not matured into final judgment; that the said Kern

& Son, between the date of the rendition of the verdict and the judgment thereon, and before the lapse of the delays for the signature of the Judge to the judgment as aforesaid, filed a petition in the Civil District Court for the Parish of Orleans, in which they averred their desire and purpose to surrender their property to their creditors; that, upon the presentation of said petition and in accordance with statutory direction, the Judge of the said Civil District Court, to whom said cause was allotted, entered an order upon the petition of said Kern & Son, staying all proceedings against their persons and property; that the effect of said order, under the Statute law and jurisprudence of the State, is to suspend all *primary actions* in said Court, and thereby prevent a reduction to judgment of a demand pending.

That, under the Statute law of Louisiana (Sec. 1816, R. S.), all pending cases against the insolvent are, upon the application of the insolvent or his representative, referred to the Court charged with the administration of the insolvent's property, and said causes are there cumulated to be tried *in concurso;* that, unless said stay order is specially plead, the courts of concurrent jurisdiction in the State of Louisiana have the right and the power to continue in the trial of cases depending before them, and to render judgment therein, the said stay order being operative upon the person prosecuting his demand against the insolvent, and not being directed against the Courts of the State; that said stay order is in the nature of a general writ of injunction, and can only be operative or effective as against the people of the State of Louisiana, subject to its laws and jurisdiction, and cannot affect or control the jurisdic-

tion of the Federal Courts, nor the process of said courts, nor suitors therein, if, in other respects, said suitors are not subject to the jurisdiction of the State Courts; that the effect of the stay order is not to disturb the writ of attachment; that the operation of the stay order acting upon those persons prosecuting demands against the insolvent, is to prevent his further prosecution of the claim, and the primary action being suspended, it carries with it a suspension of the conservatory writ of attachment, which cannot receive recognition or enforcement until after the judgment of the Court upon the primary demand, and maintaining the writ issued, which writ is, under the laws of the State, to conserve the property in order that it may be made to answer the main demand.

Petitioner represents that the said Shwartz & Sons, who, in the absence of the combination and conspiracy as aforesaid, were without interest to attack or question the writ of attachment obtained by your petitioner against Kern & Son, did, immediately after the surrender of said Kern & Son in insolvency, and the obtention of the stay order hereinbefore referred to, appear in the cause of The H. B. Claflin Co. vs H. Kern & Son, and, by motion in that behalf, suggested the insolvency of said Kern & Son and the stay order granted therein, and prayed that the attachment of petitioner against Kern & Son be set aside and vacated, and the said Shwartz & Sons plead the said stay order against the recognition of your petitioner's attachment under the judgment entered in the cause; all of which will more fully and at large appear by said plea, a certified copy of which is hereto annexed and made part hereof.

That said plea and motion for a new trial on the part of H. Kern & Son was submitted to the Judge of said Circuit Court, and the said judgment, entered on the 6th of December, 1892, in favor of your petitioner and with recognition of its attachment, was set aside and a new trial ordered by said Court; that the error into which the learned Judge of said Court was led was in the assumption and belief that the said stay order in the State Court affected and controlled the process of the Federal Court, under and by virtue of Section 933 of the Revised Statutes of the United States, whereas, in fact and in truth, the stay order of the State Court in the insolvency proceedings did not and could not affect either the jurisdiction or process of the Courts of the United States, or of causes properly constituted and depending therein, or of suitors invoking its jurisdiction, and that, as long as the said Circuit Court had the power and jurisdiction to hear and determine the primary cause, it was its duty, under the Constitution and laws of the United States, to accord to suitors in the said Court, in the absence of constitutional direction, statutory enactment, or treaty stipulation, all the advantages, remedies, and benefits incidental to said primary cause; that, while it is true that Section 933 of the Revised Statutes of the United States, directs that attachments shall be dissolved in the Federal Courts whenever a contingency occurs which would dissolve them in the State Courts, the statutory direction refers and is confined to the dissolution of the writ *qua* writ, and does not undertake to suspend the primary action to which said writ is simply incidental, and that the dissolution of the writ must be either under the Statute law of the State or of the jurisprudence as an-

nounced in the written or printed opinions of its Court of last resort, and that there is neither statutory law nor jurisprudence in the State of Louisiana which provides, in words, in substance, or in effect, that the surrender in insolvency, with a stay order, operates a dissolution of writs of attachment, there being no lien, under the attachment law of Louisiana, until the claim is reduced to judgment; that the lien only becomes operative in consequence of the execution under the judgment, and relates back to the date of the issuance of the writ, and as the stay order suspends the primary action in the State Court, there never can be recognition of the attachment in consequence of said suspension; but that said stay order is inoperative and ineffective in the Federal Courts, and that the rendition of the judgment therein carries with it the attachment, if in all other respects the demand can be reduced to judgment.

Petitioner further represents, that the learned Judge of said Court was led into error in the setting aside of the verdict and the judgment thereon, in consequence of a misapprehension and misapplication, both of the Statute law and jurisprudence of Louisiana as administered by its Courts.

Petitioner represents that the said cause was again assigned for trial upon the demand of the H. B. Claflin Co. vs. Kern & Son, and the intervention of A. Shwartz & Sons, asserting title and ownership to the property held under said writ and released by them upon bond, as aforesaid; and, that after hearing by the Court (a stipulation having been entered into waiving trial by jury), a decree was entered recognizing petitioner's primary claim for the

amount of its debt, with interest and costs as prayed for, and the trial Judge further decreed, that the agreement of sale of date of February 20th, 1892, "*did not transfer to the intervenors, A. Shwartz & Sons, the property attached, so as to affect the rights of the plaintiffs as attaching creditors of the defendants herein, and that the* said *intervention be, and the same is hereby dismissed* at *intervenor's costs,*" all of which will more fully and at large appear by reference to a certified copy of the said decree hereto annexed, and for greater certainty made part hereof.

Petitioner represents, that upon the final decree rendered by the trial Judge of the Circuit Court, your petitioner's rights were in all respects protected, and under the decree hereinabove referred to, it enjoyed the advantages and benefits resulting from the attachment obtained by it in the said cause, and would have been paid its debt in full, with interest and costs, the said Judge having decreed that the title to said property was, at the time of the issuance of the writ, in Kern & Son, and, in consequence thereof, the intervention of Shwartz & Sons was dismissed at their costs and no recognition accorded them of any right in or to said property to the prejudice of petitioner.

Petitioner further represents that, under the laws of the State of Louisiana, immediately upon a cession being made, the creditors, upon petition, may have appointed a syndic who provisionally takes charge of the assets of the insolvent, until such time as the mass of the creditors, at a meeting convened under the Court's order, elect a definitive syndic; that, in accordance with the provisions of law above stated, a provisional syndic was appointed, but that he did not,

although advised of the pending suit, intervene, during his incumbency as provisional syndic, in the said cause, or plead the insolvency and stay order, to either suspend the primary action against the defendant or ceding debtor, or affect the proceedings of said Circuit Court, and that said insolvency and stay order was only plead by said A. Shwartz & Sons, who were without interest to question the said attachment.

Petitioner further represents that, at the date of the surrender in insolvency of said Kern & Son and the plea interposed on motion by A. Shwartz & Sons, the property previously held under the operation of the writ was no longer in the Marshal's possession or subject to his control, and that, in lieu thereof, stood the bond of A. Shwartz & Sons, given by them, under the Court's order, upon their intervention, to release the same; that it had been determined, on their said petition of intervention, that they were not the owners of said property, and to allow the said attachment to be dissolved would be to give them possession of property to which they had no title and to release them from the bond executed to secure possesion of the same.

Petitioner represents that the judgment of the Court of first instance, decreeing that the attempted transfer by Kern & Son to Shwartz & Sons did not affect the rights of plaintiff as attaching creditor, was, as already averred, ample protection to your petitioner for the full payment of its debt.

Petitioner avers that the said Shwartz & Sons prosecuted a writ of error from the judgment pronounced in the cause, to the Circuit Court of Appeals of the United States, for

the Fifth Circuit, and assigned as error *inter alia*, that the Court of the first instance erred in not dissolving the attachment in consequence of the insolvency of Kern & Son and the stay order granted therein; and that the judgment pronounced in the cause in effect maintained the attachment, although the reasons of the Court of first instance, in its opinion, decided that the insolvency dissolved the attachment, all of which will more fully and at large appear by the writ and assignments of error, a certified copy of which is hereunto annexed and, for greater certainty, made part hereof.

Petitioner further represents that the said Circuit Court of Appeals for the Fifth Circuit, upon hearing, decided that writs of attachment emanating from the Federal Courts were dissolved under Section 933 of the Revised Statutes of the United States, in consequence of a surrender by the debtor or defendant in the cause under the State insolvent laws and the stay order granted therein; and in this your petitioners humbly represent that said Court erred, inasmuch as there is neither statute law nor jurisprudence in Louisiana that a writ of attachment, *qua* writ, is affected or disturbed in consequence of insolvency proceedings in the State Court, and that the Court erred in not according to your petitioner, the advantages and benefits incidental to its primary cause against Kern & Son, and that Section 933 of the Revised Statutes of the United States provides for the dissolution of writs of attachment under the laws of the State, and does not provide, nor is the Court authorized or justified in interpolating into the Statute another and an additional mode of disturbing the writ when properly obtained and maintained, by stating

that it was suspended in consequence of an order emanating from a court of foreign jurisdiction, and, in consequence of said suspension, practically dissolved; that the said Federal Courts owe neither obedience nor allegiance to the State Courts, nor are they subject to its process, nor can their jurisdiction be interfered with or controlled by any order emanating from it, nor are their suitors affected or controlled in the exercise of their constitutional rights, if in other respects they are not subject to the jurisdiction of said State Courts.

Petitioner represents that, on the writ of error taken by Henry Kern, as surviving member of the firm of H. Kern & Son, and as heir to Emile Kern, and upon the part of Mrs. Henry Kern, impleaded as an heir, no complaint was made of the judgment as rendered, except in so far as it condemned them solidarily for the payment of the debt of Emile Kern, without having been properly impleaded in the Court of first instance; that, upon said assignment of error, the said cause was remanded for a *venire de novo*, but your petitioner complains that unless the error in the decree of said Circuit Court of Appeals, in adjudging and decreeing that the attachment of the plaintiff was dissolved in consequence of said surrender be corrected, that the said cause will be returned to the Court of the first instance, where the only relief that petitioner can obtain is to have recognition of its debt, without the benefits and advantages incident to its writ of attachment, which it has maintained before the Court of first instance, and out of the property seized whereunder, or the bond substituted in lieu thereof, your petitioner could be paid its debt in full, with interest and all costs; and that, therefore, it is necessary that this Honorable Court should

determine, upon full hearing, whether, under the Statute law of the United States, writs of attachment are affected or dissolved in consequence of a general writ of injunction emanating from a State Court, and whether in the absence of statutory direction in the State of Louisiana, the stay order shall have the effect of dissolving attachments in the Federal Court, and not merely suspending them in consequence of the suspension of the main or primary action.

Petitioner further represents, that immediately upon the rendition of the judgment by the said Circuit Court of Appeals, as aforesaid, application was made for a rehearing and a review by the Court of its decision; that said rehearing was passed upon and denied, and the mandate suspended until a reasonable time would be afforded your petitioner to apply to this Honorable Court for a review of the decision of the Circuit Court of Appeals, the said Circuit Court of Appeals refusing to certify this question to this Honorable Court for its opinion on the law.

Petitioner represents that the question involved is one of great importance, affecting the rights of suitors in the Federal Courts who, because of their citizenship, have the constitutional right to invoke the jurisdiction of the Courts of the United States, and to assert therein, in causes properly constituted, their legal rights and have the benefits and advantages which the laws accord them.

Petitioner avers that it should have the opinion of this Honorable Court as to the measure of obedience and allegiance it, as a citizen of the State of New Jersey, owes to the process of theState Courts of Louisiana, when, by constitutional provision, it has its right to assert its demands against the citizens of the State of Louisiana in the Federal Courts;

that to subject your petitioner, in common with other citizens of the United States, in its dealings with the citizens of the State of Louisiana, to the control or process of the courts of that State, and to deny them the advantages of the laws of the State of Louisiana asserted by them in the Federal Courts, operates upon them and your petitioner a denial of the substantial rights and protection accorded them by the Constitution and laws of the United States.

Petitioner further represents, that the error into which the learned Court of Appeals fell, was in a measure brought about by a dictum of one of the Justices of this Honorable Court, and which announced a doctrine which is without sanction either in the statute law or jurisprudence of Louisiana, and is not supported upon principle; and that this Court should announce its affirmance or withdraw the principle of the doctrine stated, in order that citizens of other States, asserting their rights in the Federal Courts of Louisiana, may be advised whether the process of a State Court can impede, retard or deprive them of substantial legal rights in the Federal Courts, although the said suitors owe neither obedience nor allegiance to the State Courts from which the said process emanates.

Petitioner further represents that the decision of the said Circuit Court of Appeals, as it now stands, with the sanction of the dictum of this Honorable Court in the case of Tua vs. Carriere, 117 U. S. 201, is without statutory law to support it, and has no recognition in the jurisprudence of the State of Louisiana.

Petitioner annexes hereto, as part hereof, a copy, duly certified, of the record of said Honorable Circuit Court of Appeals, in cause No. 159, of its docket, entitled A.

Shwartz & Son et al. vs. The H. B. Claflin Company; H. Kern & Son et als. vs. The H. B. Claflin Company, which copy contains copies of all documents and pleadings hereinbefore referred to as part of this petition.

Wherefore your petitioner prays, that a writ of *certiorari* may issue to the said United States Circuit Court of Appeals for the Fifth Circuit, to bring up for review before your Honors, the judgment and decree of said Court, and that until this Court can hear and pass upon the said writ of *certiorari*, your Honors will issue an order directing the said Court to stay its mandate, and to hold the same subject to the orders and decrees of this Honorable Court.

And your petitioner prays, that on the hearing of the said writ of *certiorari*, so to be issued, the judgment and decree of the said United States Circuit Court of Appeals for the Fifth Circuit, be quashed and reversed, and that your petitioner may have such further and other relief in the premises as law and justice may require.

HENRY L. LAZARUS,
E. B. KRUTTSCHNITT,
Attorneys for Petitioner.

STATE OF LOUISIANA, }
Parish of Orleans. }

Personally came, and appeared before me, the undersigned authority, Ernest B. Kruttschnitt, who being duly sworn, deposes and says, that he is one of the attorneys for petitioner in the foregoing petition, and that all the facts and matters and things set forth therein are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this 20th day of April, 1894.

(Signed) E. B. KRUTTSCHNITT,
[SEAL] HEWES T. GURLEY,
Notary Public.

APPENDIX.

[Filed December 23, 1893.]

UNITED STATES CIRCUIT COURT OF APPEALS,

FIFTH CIRCUIT.

November Term, 1893.

A. SHWARTZ & SONS, Plaintiffs in Error,

vs.

THE H. B. CLAFLIN CO., Defendant in Error.

H. KERN & SON, Plaintiffs in Error,

vs.

THE H. B. CLAFLIN CO., Defendant in Error.

Before PARDEE and MCCORMICK, Circuit Judges, and LOCKE, District Judge.

STATEMENT OF FACTS.

Suit was brought by the H. B. Claflin Company against H. Kern & Son, in the Circuit Court of the United States, to recover $21,728 due the plaintiff on certain notes. A writ of attachment issued, under which the marshal seized the stock of goods in the store formerly occupied by defendants: Shwartz & Sons were also made garnishees, as alleged debtors of Kern & Son. On the 23d of February, 1892, the day after the seizure, Shwartz & Sons filed a petition of intervention, claiming to be owners of the goods seized, and, on the day following, obtained a release of their property upon executing a forthcoming bond in favor of the marshal, in

the sum of $35,000. They also made answer to the garnishment.

On the 4th of March, Kern & Son filed an exception to the suit, alleging that they had been granted a respite by the State Court, and at the same time moved to dissolve the attachment. On the 5th, Claflin & Co. filed a general denial to the intervention of Shwartz & Sons, coupled with a special allegation that the property seized was the property of Kern & Son and liable to be attached for their debts. The motion of Kern & Son to dissolve the attachment upon the issues then presented was tried by a jury and the attachment sustained.

On December 6, 1892, Shwartz & Sons moved to dissolve the attachment, on the ground that the defendant had been adjudged insolvent by the State Court, and on the 10th of December supplemented this motion with another, referring to the cession of December 8, 1892.

On December 6, Victor Mauberret, alleging himself to be provisional syndic, moved to set aside the attachment for the same reason. The Court also, on the same day, gave judgment against Kern & Son for the amount of the debt. On the 8th, Kern & Son moved for a new trial, which was granted on the 28th. Thereupon, all parties, by a stipulation dated January 10, 1893, waived trial by jury, and submitted the main cause, together with the intervention of Shwartz & Sons, for trial by the Court. On the same day Claflin & Co. discontinued the garnishment proceedings against Shwartz & Sons.

On March 3, 1893, Kern & Son presented and asked leave to file a motion to dissolve the attachment, setting up their

adjudication as insolvents. Leave to file was granted April 21st.

The case then stood in this attitude: At issue between the Claflin Co. and Kern & Son as to the debt and upon the motion to dissolve the attachment; at issue between the Claflin Co. and Shwartz & Sons on their intervention, and on their motion to set aside the attachment.

Upon these issues the cause was tried before the Court and submitted March 3, 1893. On March 10th, following, the counsel for plaintiff, in writing, suggested to the Court that since the trial and submission of the cause, Emile Kern, a member of the firm of H. Kern & Son, and one of the defendants, had departed this life, as appeared by affidavit presented, and on further suggesting to the Court that said Emile Kern died intestate; that he was unmarried, and that his sole heirs were Henry Kern, his father, and Mrs. Henry Kern, his mother, and that they, being the heirs of said deceased, should be made parties to the cause, it was ordered, "that Henry Kern and Mrs. Henry "Kern be made parties hereto; that a duly certified copy "hereof be served upon them, and that whatever judgment "be rendered in this cause be rendered for or against said "heirs representing said Emile Kern;" and on the same day a copy of the said motion was served upon both Mr. Henry Kern and Mrs. Henry Kern, but neither thereafter appeared in said cause as heirs or representatives of Emile Kern, nor was any default entered against them, nor any issues as to their said heirship and responsibility in the case submitted to a jury.

The Court, upon consideration, April 21, 1893, filed the

following document, headed "Opinion of Court, Findings of Fact and Conclusions of Law."

CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA.

H. B. Claflin Co.
vs.
H. Kern & Son,
A. Shwartz & Sons, Intervenors. } No. 12,059.

BILLINGS, JUDGE.

On Feb. 20th, 1892, the following contract was entered into between the defendants and intervenors:

Agreement.

This agreement entered into this 20th day of February, 1892, between H. Kern & Son of the first part and A. Shwartz & Sons of the second part, witnesseth: The said H. Kern & Son agree to sell to said A. Shwartz & Sons, who bind themselves to purchase, the entire stock in trade, merchandise, fixtures and all the appurtenances of the dry goods store, corner of Canal and Dauphine streets, with no other exception than one iron safe, one desk and one stove.

This sale is to be made on the following basis, viz:

First. All piece goods having over ten yards, and all other merchandise upon which the cost price shall be marked, to be taken at said cost, less ten per cent. upon the aggregate amount.

Second. All remnants or piece goods measuring less than ten yards shall be taken at the selling price, less fifty per cent. upon the aggregate amount.

Third. All piece goods measuring more than ten yards, and other merchandise upon which the cost price is not marked, shall be taken at the selling price, less twenty-five per cent. upon the aggregate sum.

Fourth. The invoices for all goods in transit, purchased by said H. Kern & Son, shall be turned over to the purchasers, who, upon delivery of said goods, shall assume the amount of said invoices and be responsible therefor.

Fifth. All the furniture, tools and fixtures (save those

above mentioned), shall be accepted for the price of one thousand dollars.

Sixth. In order to expedite the ascertainment of the price of the within sale, the said parties of the first and second parts shall put at once as many clerks as they may deem necessary (satisfactory to both parties), to measure all unmeasured piece goods and count all other merchandise; thereupon persons representing both parties shall call off the said merchandise to others likewise representing both parties (in such manner as complete fairness shall exist), who shall enter the merchandise in books numbered alike, a copy of which to belong to either party. As soon as the entire stock shall have been thus entered, the parties of the first and second part shall proceed, without unnecessary loss of time, to the ascertainment of the value of said stock of merchandise on the basis above established, which value shall be thereupon paid in cash by said A. Shwartz & Sons to said H. Kern & Son.

Seventh. The book accounts are not included in this sale, but shall remain the property of said H. Kern & Son, and for the purpose of facilitating the settlements of said firm and the collections, they shall be allowed the use of space within the building for a reasonable time, free of rent.

Eighth. The said A. Shwartz & Sons shall enter into immediate possession of the said stock of merchandise, and be permitted to dispose of the same, as they may deem best, after the said goods shall have been duly entered, as stipulated in paragraph sixth—nor shall any delay in the ascertainment of the total of the amount of the present sale delay the delivery of said goods to said A. Shwartz & Sons.

Ninth. The lease to the building shall be transferred to said A. Shwartz & Sons by said H. Kern & Son, who shall obtain the consent of the owner thereto.

Tenth. In order to bind the present sale and agreement, the said A. Shwartz & Sons have presently paid to the said H. Kern & Son, who acknowledge the receipt thereof, the sum of forty thousand dollars. It being well understood, that in the event the stock, etc., hereby sold should be

found, under the present agreement, to be worth less than that sum, the said H. Kern & Son shall make good the difference; likewise, should the said stock, etc., be found to exceed the amount herein paid, the said A. Shwartz & Sons shall pay said difference to H. Kern & Son, as soon as ascertained.

Thirty-three words erased, null and void.

At the moment of signing it was agreed that, in case of disagreement in the carrying out of the present agreement between the parties of the first and second parts, the matter in difference shall be submitted to arbitration—Henry Beer to act on the part of H. Kern & Son, and Gus Lehman, Sr., to act on the part of A. Shwartz & Sons—these two to appoint an umpire, the parties to abide by the award of the majority of the arbitrators.

Signed in presence of:
F. J. DREYFOUS,
G. LEHMAN,

H. KERN & SON,
EMILE KERN,
A. SHWARTZ & SONS.

The 20th of February fell on Saturday. At from half-past seven to eight A. M. on Sunday morning, February 21st, the measuring and counting of the merchandise commenced; it was continued during Sunday and into Monday. The levy of the attachment by the Marshal was made on Monday afternoon between 2:15 and 2:30.

As to the time when the measuring, counting and entering in the nine books duplicated, without the extension of the price, were completed.

On this issue, on the part of the intervenors, 29 witnesses were called; 19 testified that they, individually, completed their work before the time of the levy of the writ; one testifies that he does not remember the time; one testifies that his work was completed on Monday evening, or after the levy; four who were not engaged in taking the inventory, and who were not there Sunday or Monday, but reported Tuesday for work, did not know of their own knowledge the time that the inventory was completed, but didn't see any inventorying going on in their department; one testifies that the inventory was completed before the levy, and the two Messrs. Shwartz' testimony is to the effect that

while the entries were not entirely completed, there being some things left unfinished, the entries were made before the levy.

On the part of the plaintiffs, 16 clerks testify that they completed the measuring and the counting and entering not till after the the time of the levy; one testifies that he completed his work before the levy; one testifies that the clerks were measuring and counting goods after the levy, and two do not remember the time.

The Chief Deputy Marshal testifies that the measuring was going on after the levy was made.

Another deputy testifies that they were unrolling goods and taking down goods from the shelves and placing them on the counter. He says he judges they were measuring. A third deputy, who was not there Monday, but was there on Tuesday, does not testify as positively as the others, but says they were taking down goods from the shelves and putting them on the counter, but does not testify that on Tuesday they were counting or measuring.

Captain Donnally, the United States Marshal, testifies that Monday evening he was at the store and heard them quarrelling and contending about the quantity or measurement of goods.

The senior Mr. Kern, one of the defendants, testified that the measuring and the counting were concluded at 5 or 6 o'clock Monday evening.

It is to be observed that twenty-three witnesses testify to the completion of the measuring and counting before the levy of the writ; twenty-four testify to the contrary that the levy was made before the counting or measuring was finished.

Of the 23 witnesses 21 were clerks now in the employ of the intervenors, and two were the intervenors.

Of the 24 witnesses, nine were in the employ of the defendants, eight were formerly, but not now in the employ of the intervenors, two are now in the employ of the intervenors, four were the marshal and his deputies; the remaining one was the senior defendant, Kern.

This summary shows that the preponderance of testimony

is against the claim of the intervenors and in favor of that of the plaintiff, and I find, as a fact, that the levy of the writ of attachment was made before the measuring, counting and entering without extension of the price of the goods was completed.

I find further, as facts, that on Saturday two checks, amounting in the aggregate to $40,000, were delivered by the intervenors to the defendants as the estimated price of the whole stock of goods agreed to be sold.

That on Sunday morning the defendants delivered the keys of the store to the intervenors, who opened the store with them on Monday morning.

That on Monday, after the levy of the writ of the plaintiff, neither of the two checks having been presented for payment, and not having been paid, an agreement was entered into between the intervenors and the defendants that the whole of the purchase price of the goods sold, except the twenty-five hundred belonging to G. Lehman, should be deposited with and held by F. J. Dreyfous in trust, to protect A. Shwartz & Sons from loss in case their title to the stock of goods should not be maintained.

That it appears from the evidence that from this amount so deposited with Dreyfous, payments were made on the drafts of the defendants, so that the amount was reduced to $27,415.56, down to May 2d, 1892, and that subsequently this last amount was turned over to W. S. Benedict, Esq., who received the same, and holds and has paid a portion of the same, as appears from his statement.

The H. B. Claflin Co. } No. 12,059.
vs.
H. Kern and Son, et als. } U. S. Circuit Court.

Statement of W. S. Benedict.

There was no written contract respecting the trust established by H. Kern & Son, in view of the attachment, to protect A. Shwartz & Sons. The check for $37,500 which has been offered in evidence, was held by F. J. Dreyfous as Trustee under this trust, and from its proceeds various payments were made by H. Kern & Son down to May 2d, 1892. Mr. Dreyfous, having retired from the trust, the

balance of $27,415.56 was turned over to me as money of H. Kern & Son, to be held in trust for the same purpose, viz: to protect A. Shwartz from danger of double liability in the premises.

By consent of H. Kern & Son, the following sums were paid from the said fund of $27,415.56, viz:

1st.	Stenographer's fees	$ 368 15	
2d.	J. A. Mercier, rent due by H. Kern & Son on the Canal street store up to sale of Feb. 20, 1892	7083 00	
3d.	P. Roberts & B. Titche, Attorneys of H. Kern & Son	1000 00	$ 8451 48
	Balance		$18,964 08

A balance of $18,500, funds of H. Kern & Son, is held by me under the trust to protect A. Shwartz & Sons in the premises. The further balance of $464.08 is also in my hands, less payments for disbursements incidental to the trust. W. S. BENEDICT.

That it also appears that the defendants, after their insolvency, gave information as to this amount so held, surrendered by Mr. Dreyfous and Mr. Benedict to the Insolvency Court and the terms and conditions upon which it was deposited and held.

The facts as to the defendants' adjudication as insolvents and the proceedings in the Insolvent Court appear in the findings of the Court upon the motions for a new trial filed December 17, 1892, which are adopted and made part of these findings.

Upon these facts two questions arise:

1st. But for the peculiar arrangement as to the disposition of the price of these goods, and laying that for the time being out of consideration, would the sale have been complete and would the title to the goods have passed to the intervenors?

There had been a delivery, symbolical and actual. $40,000 had been given in checks as the estimated price which was

to be ascertained by measuring and counting, and the price increased or diminished, and paid or returned accordingly.

I think, laying aside the consideration of the agreement as to price, the case of Shuff vs. Morgan, 9 Martin, U. S., p. 592, is in substance this case. In each case there was a delivery, and nothing remained to be done but the ascertainment of quantity. Articles 2458 and 2459 are but re-enactments of Articles 6 and 7 under title VI, p. 346, the Code of 1808. In the case of Shuff vs. Morgan, the Court held that the rule *res perit domino* was a general but not a universal one; that with complete title in the vendee for him to run the risk of the destruction of the property sold was of the nature but not of the essence of the contract of sale, and that the reservation by the statute of the risk in the vendor did not prevent the title to the thing agreed to be sold passing to the vendor so as to prevent a creditor of the vendor from making a valid attachment.

There is nothing peculiar in the provision in the contract of sale in this case. It was in substance the same as in Shuff vs. Morgan. The whole effect of paragraph 8, when considered in connection with paragraph 6, is that the stock of goods was sold, and the title was vested in the vendors, the intervenors. There was to be a tale of the goods to determine the exact amount of the price. The case of Shuff vs. Morgan was decided in the year 1824, and has never been overruled or called in question. So that so far as concerns the provision as to the tale, the property would have passed.

There remains the question as to what the Court must say as to the effect of the arrangement about the price.

The facts necessary to be considered are these: A debtor is in failing circumstances, a sale of his whole stock of goods is made. The consideration is $40,000. For this amount checks are given. Before the checks are paid or presented a creditor levies an attachment. By a secret agreement between the seller and the purchaser the whole price ($40,000) is placed in trust in the hands of a third person to indemnify the purchaser against loss by service of the attachment. The legal effect of such a qualifica-

tion of an agreement to sell is to subordinate the question of who shall receive the consideration to the question as to the validity of the sale. The trustee holds in trust for the vendor in case the sale shall be held to be valid, and for the vendee in case it shall be held to be void, and it is a secret trust. In the eyes of the creditors the property has been placed beyond the reach of the creditors by the sale—by this secret trust the consideration for the sale also is placed beyond their reach. It is a sale if the attachment is defeated, and no sale if it is maintained.

To render a sale valid there must be price. That price cannot conditionally belong to the purchaser. Nor can the indications of a payment be held out which are not according to fact when the necessary effect of such indications must be to baffle the creditors of the vendor.

I think such a transaction, before the checks have been paid, engrafts on to the sale a qualification which becomes a part of the original agreement of sale, and characterizes it precisely as if it had been made along with it; and that courts must declare a transaction with such a feature invalid and ineffectual to defeat the rights of the attaching creditor to the extent of his attachment.

The conclusions of law from the facts above found are:

1st. That the attachment was dissolved by the insolvency proceedings in which the defendants made and the proper court accepted a surrender of all their property. Sec. 933 R. S., 9 vol., Stat. pp. 213 and 214, especially the intent and meaning of the Statute as shown in the title and as declared in the body of the act.

2d. That the plaintiffs have and recover against the defendants $21,728.00, with interest as prayed for in their petition, and their entire costs in the cause and upon the attachment up to the time of the surrender, without any lien or privilege resulting from the attachment.

3d. That the intervention of A. Shwartz & Sons be dismissed, and that they pay the costs of the intervention.

The Court finds as further facts, as follows:

That Monday February 22, 1892, was a legal holiday,

and under the State Law the Banks in New Orleans were closed.

Also, that the intervenors' store on the Cor. of Bourbon and Canal streets, was burned on the 17th of February, 1892, and that they were seeking for another store and stock of goods to continue their business and employ their clerks.

(Signed) EDWARD C. BILLINGS, Judge.

Upon this opinion, findings, and conclusions of law, formal judgment was rendered the same day in favor of Claflin & Co., plaintiffs, against H. Kern & Son, and *in solido* against Henry Kern and against the legal heirs and representatives of Emile Kern, made parties in this cause, in the full and entire sum of $21,722, with interest, etc. This judgment gave no privilege upon the goods attached, but contained the following special clause:

"It is further ordered, adjudged and decreed, for the reasons assigned in the opinion of the court filed this day, that the agreement of February 20, 1892, herein did not transfer to the intervenors, A. Shwartz & Sons, the property attached, so as to affect the rights of plaintiffs as attaching creditors of the defendants herein, and that the said intervention be, and the same is hereby, dismissed at intervenors' cost.

The November term of the Circuit Court ended April 22, 1893, the day said judgment was signed. But on the 2d day of May the Circuit Judge made and filed additional findings of fact.

The record shows that these additional findings were made at the request of counsel for Claflin Co., and against the objections of Shwartz & Sons at the time the writ of error in this case was applied for, and that the filing of them was duly excepted to by Shwartz & Sons.

H. Kern & Son, Henry Kern and Mrs. Henry Kern and Shwartz & Sons have brought the case here by writs of error. The errors assigned by Shwartz & Sons are as follows:

1. The Court, having found as a matter of fact, and as a conclusion of law, that the attachment issued herein was set aside and dissolved by the insolvency and cession of the defendants in the cause, under the insolvent laws of Louisiana, in the State Court, No. 33,424, Civil District Court, Parish of Orleans, on the 8th of December, 1892, erred in proceeding to adjudicate on the title of the intervenors to the property seized under the said process of attachment.

2. The Court having found the attachment herein was set aside and dissolved December 8, 1892, erred in not directing the delivery of the property attached to the intervenors, from whose possession it was taken.

3. The Court, having found as a matter of fact and law, that the attachment herein was dissolved and set aside December 8, 1892, erred in assuming to decide on the title of intervenors to the property which had been seized under said attachment, when there was no longer any issue remaining in the cause as to such title.

4. The Court erred in decreeing that the sale of their stock of merchandise, and the delivery thereof by the defendants, H. Kern & Son, to the intervenors, A. Shwartz & Sons, did not vest the title thereto in said intervenors. And the Court erred in dismissing their intervention.

5. The Court erred in decreeing that the agreement of February 29, 1892, herein, did not transfer to the intervenors the property attached, so as to affect the rights of the plaintiffs as attaching creditors of the defendants herein.

6. On the facts found and conclusions stated by the Court, and the motions pending in the record, the Court erred in not formally decreeing in the judgment, that the attachment was dissolved and set aside December, 1892, by the insolvency and cession of the defendants in the cause in the Civil District Court for the Parish of Orleans, No. 33,424.

7. The finding of facts having been made, and the judgment therein having been rendered on the 21st day of April, 1893, and signed on the 22d day of April, 1893, at

and during the November term of the Circuit Court, which expired on the 22d day of April, 1893, the Court erred in amending said finding of facts, and in finding additional facts against the objections of the intervenors after said term had passed, and ordering the same to be filed at the April term following, to-wit: On the 2d day of May, 1893."

The errors assigned by H. Kern & Son and Henry Kern and Mrs. Henry Kern are as follows:

I.

The Court erred in rendering any judgment against Mrs. Henry Kern and against Henry Kern, as heirs of Emile Kern, or as legal representatives of Emile Kern, inasmuch as they were as such heirs never made parties to these proceedings.

II.

The Court erred in rendering any judgment against said Mrs. H. Kern, as heir or legal representative of said Emile Kern, because there were no proceedings conducted contradictorily with her in this cause.

III.

The Court erred in rendering judgment against said H. Kern and Mrs. H. Kern as one of the heirs or legal representatives of Emile Kern, because no evidence whatever was offered, nor is there any evidence whatever in the record to show or establish that said Mrs. Kern is the heir or one of the heirs of said Emile Kern, or that she is the legal representative of said Emile Kern, or has in any manner accepted his succession.

IV.

The Court erred in rendering judgment against said Mrs. Henry Kern, as heir or legal representative of Emile Kern, because plaintiff does not allege that she is the succession representative of Emile Kern, or that she has accepted his succession.

V.

The Court erred in rendering judgment against said Mrs. H. Kern *in solido* with H. Kern & Son, and H. Kern and Emile Kern, because, if sued as the heir, she could under

no circumstances be condemned for more than her virile share.

VI.

The Court erred in rendering a judgment against said Mrs. H. Kern as heir or legal representative of Emile Kern, because she could, under no circumstances, be responsible for more than a virile share, and there is no evidence to show the number of heirs.

VII.

The Court erred in rendering any judgment against Mrs. H. Kern as heir or legal representative of Emile Kern, because no jury was impaneled to render a verdict, nor did she appear in said cause, nor was there any waiver of any jury.

VIII.

The Court erred in rendering any judgment in the cause either against the said Mrs. Kern, or against the firm of H. Kern & Son, by reason of the failure to make the succession of said Emile Kern, or the legal representatives of said Emile Kern, parties; and by reason of the failure of the plaintiff to procure a waiver of a jury, in consequence thereof the entire judgment is a nullity.

PARDEE, Circuit Judge, delivered the opinion of the Court:

Although the record is voluminous and, according to the brief and arguments submitted, it is bristling with points of law, novel and otherwise, we find it necessary to consider two questions only:

I.

Henry Kern and Mrs. Henry Kern complain of a judgment against them, as the legal heirs and representatives of Emile Kern, condemning them *in solido* to pay the claim of Claflin & Co. against Henry Kern & Son, when, as the record shows, they have had no day in court, no default entered against them, nor the verdict of any jury holding

them liable. It appears they were brought into the case after hearing and submission, upon an assertion that they were the sole heirs of Emile Kern, deceased, and by notice only that they were made parties to the cause, and that any judgment rendered in the case should be rendered for or against them as heirs representing Emile Kern.

Article 120 of the Code of Practice of Louisiana contains provisions as follows:

"If one against whom there was a cause of action die, leaving one heir only, the suit shall be carried on against such heir as it would have been against the deceased.

If the suit had already been brought against the deceased, and he had not answered, it shall not be interrupted, but it shall be continued against the heir by a mere citation or notice served on him to that effect, within the delay for original citations, according as the distance may be from his domicile to the court where the action has been brought.

If, on the contrary, the deceased have two or more heirs, the plaintiff may proceed personally against each of them for the share which he inherits, if that share be sufficiently known and ascertained by an inventory or partition; otherwise they can only be sued each for a virile portion—that is to say, for an equal part of the debt, dividing it into as many parts as there are heirs.

If the suit had already been commenced against the deceased, it shall be continued against his several heirs by citing each of them separately, as if there were only one; but judgment can only be given personally against each for his hereditary share or virile portion, as above provided.

In the case in hand the last provision quoted applies. Under that provision it was necessary to have cited each of the heirs of Emile Kern to answer the demand against them as heirs and legal representatives of Emile Kern, giving them and each of them, an opportunity to admit or

deny heirship, or to make any other defense personal to Emile Kern, deceased, or to themselves, which the case might warrant. This appears perfectly clear, as the law of Louisiana is well settled that the heirs are not liable for the debts of their ancestor unless they shall accept his succession. It is also clear, from the provision referred to, and other Articles of the Louisiana Code of Practice, as well as the Civil Code of Louisiana, that judgment can only be given against heirs, when found liable for the debts of their ancestors, for their virile portions. See Art. 113, C. P. La.; C. C. 1426, 1427.

The judgment complained of is erroneous both because the parties condemned did not have their day in court, and because they were condemned beyond the limits allowed by law, if liable at all.

II.

The case shows that after the attachment sued out in this case against Henry Kern & Son, and before final trial and judgment, the said Henry Kern & Son made a voluntary cession of their property to their creditors under the insolvency laws of Louisiana, that this voluntary cession prior to final trial and judgment was brought to the attention of the Court by suitable pleadings both by A. Shwartz & Sons, intervenors, and by Henry Kern & Son, defendants, and thus the question is fairly presented on the record as to the proper disposition of the attachment issued in the case.

Authority to issue attachments in common law causes in the Circuit Courts of the United States is found in Section 915 of the Revised Statutes, which reads as follows:

"In common law causes in the circuit and district courts

the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: Provided, That similar preliminary affidavats or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

Were this section standing alone on the subject, a very strong argument could be made that wherever attachments in the State courts of Louisiana are affected after issuance by matters arising under other laws of the State, the circuit courts would be bound to give the same effect to such matters as would be given them in the courts of the State in similar cases, and, therefore, that where an attachment would be stayed or dissolved by a subsequent cession under the insolvent laws prior to final judgment in the State courts, that the same effect would necessarily follow in the Circuit Courts of the United States.

To make the matter clear, however, that such effect is to be given, the act entitled "An act to make attachments which are made under process issuing from the courts of the United States conform to the laws regulating such attachments in the courts of the States," approved March 14, 1848, (9 St. at L. 214, and now substantially embodied in Section 933 of the Revised Statutes) was enacted. That statute is as follows:

"That whenever, upon process instituted in any of the courts of the United States, property shall hereafter be attached to satisfy such judgment as may be recovered by

the plaintiff in such process, and any contingency occurs by which, according to the laws of a State, such attachment would be dissolved upon like process pending in, or returnable to, the State courts, then such attachment or attachments made upon process issuing from, or pending in, the courts of the United States within such State shall be dissolved, the intent and meaning of this act being to place such attachments in the courts of the States and the United States upon the same footing: Provided, That nothing herein contained shall interfere with any existing or future law giving priority in payments of debts to the United States."

From this it is perfectly clear that attachments sued out of the Circuit Courts of the United States are placed upon the same footing with regard to all incidents thereto as like cases in the Courts of the State. It is well settled in Louisiana that attachments issued in civil causes give rise to no lien prior to final judgment, and the law of Louisiana is, that when there is a cession to creditors under the insolvency laws of the State, that the Court accepting the cession shall order all proceedings, as well against the person as against the property of the debtor, to be stayed; and, that after such cession and acceptance, all of the property of the insolvent debtor mentioned in the schedule shall be fully vested in the creditors; (see Secs. 1790, 1791, R. S. La.); and, further, that all suits which may have been brought anterior to the failure shall be transferred to the Court in which the insolvent debtor shall have presented his schedule, and shall be continued against his syndic. (See Sec. 1816, *id.*)

The uniform construction of these laws in the Courts of the State of Louisiana is to the effect that all attachments

issued against the property of a debtor who thereafter makes a session of his property under the insolvent laws are by operation of law perpetually stayed.

See Hennen's Digest, V, Insolvency, IV, pp. 686, 687, 688, and cases there cited.

The question involved here was presented to the Circuit Court of the United States for the Eastern District of Louisiana in the case of Lafollye vs. Carriere, 24 Fed. Rep. 346; it was there held—the Circuit and District Judges concurring—that the effect of the cession and proceedings thereon under the insolvent laws of Louisiana was to stay and practically dissolve all attachments then issued against the surrendering debtor and against all property surrendered in the State Court by the direct operation of the State laws, and in the National Courts by the force of Section 933 R. S.

The same question was presented to the Supreme Court in the case of Tua vs. Carriere, 117 U. S. 201; and that Court said, through Mr. Justice Woods:

"It is not disputed that if the insolvent law of Louisiana was a valid law, and the surrender made by the surviving partners of the dissolved firm of A. Carriere & Sons was a valid surrender of the effects of the firm, the attachment of the plaintiff was rightfully dissolved. For, under the law of Louisiana, the effect of a cession of property by an insolvent person is to dissolve all attachments which have not matured into judgments. Code of Practice, Art. 724; Hannah vs. His Creditors, 12 Mart. 32; Fisher vs. Vose, 3 Rob. (La.) 457; Collins vs. Duffy, 7 La. An. 39. And by Section 933 of the Revised Statutes of the United States, an attachment of property upon process instituted in any court of the United States is dissolved when any contingency occurs by which, according to the law of the State

where the court is held, such attachment would be dissolved upon the process instituted in the courts of said State."

The opinions in these well considered and adjudicated cases in the Circuit and Supreme Courts of the United States, which would ordinarily settle the matter, are attacked with much plausibility by the defendants in error (Tua vs. Carriere, as *obiter*), urging that, as a matter of fact and law, attachments sued out of the courts of Louisiana and not merged in final judgments are not dissolved by operation of law, but merely stayed in the courts of the State when the debtor makes a voluntary cession under the insolvent laws of Louisiana, and the proper proceedings are had and the proper orders are made in the court accepting the cession.

This contention was presented to the learned Judge of the Circuit Court, who disposed of it in his opinion on the motions for a new trial and for dissolving the attachment (which opinion was made by reference part of the "Opinion, Findings of Fact and Conclusions of Law," found in the Transcript), as follows:

But it is urged on the part of the plaintiff, there is no provision of the Louisiana law which dissolved the attachment and destroys the lien; that the obstacle to the attachment in the State Court is, that the suit of the attaching creditor is stayed and he has an attachment, but he is simply prevented from enforcing it, and that there is no such obstacle in the U. S. Courts, by reason of their being established under a distinct sovereignty, and that here the creditor, having no such impediment, can proceed and make his inchoate or conditional lien or privilege absolute. The answer to this is the Statute. By its declared intent the creditor, with an attachment in the U. S. Court, must be put on the same footing with the creditor with an attach-

ment in the Courts of the State. In these last the creditor's attachment is perpetually stayed. It follows, that somehow, in the Courts of the United States, it must be also rendered inoperative, and since the creditor here may proceed to judgment, in order to prevent the inequality which the object of the Statute was to prevent, he must proceed here with the attachment dissolved. In other words, it is only by dissolving the attachment in this Court, that the equality of rights of the creditors can be preserved."

With these views we entirely concur.

Defendants in error further contend that neither the intervenors, Shwartz & Sons, nor the defendants, Henry Kern & Son, have any interest or right to suggest or plead the insolvency proceedings, and that no syndic representing the creditors of Henry Kern & Son, which syndic, it is said, is the real party in interest, has appeared in the case. This contention was sustained in the lower courts, so far as the defendants, H. Kern & Son, were concerned, but rejected as to the intervenors, "because the said interveners were "parties to the cause and have an interest in the dissolu- "tion of the attachment sufficient to make them parties "to the litigation of this question."

It seems clear that if the rights of the intervenors are favorably affected or determined by any fact outside of the record, they must have a clear right to plead such fact. As to H. Kern & Son, defendants in the court below, the reason given why they should not be allowed to plead a fact which would defeat an attachment run against them is that, by reason of their insolvency in the State Court, they are civilly dead. As the plaintiffs in the court below are demanding a judgment against H. Kern & Son, and this, notwithstanding the well known insolvency proceedings

of the State Court, we think they are not in a position to maintain, nor can we agree, that Henry Kern & Son are *civiliter mortuis*.

Aside from all this, it is to be noticed that the insolvency proceedings in the State court were called to the attention of the Court by the intervention of the provisional syndic, and that although the said provisional syndic has since disappeared from the case, he has left of record in the cause, beyond dispute, the fact that prior to the final trial and judgment in the court below, Henry Kern & Son did make a cession under the insolvency laws of Louisiana which was accepted in the proper court of the State.

The first conclusion of law found by the Circuit Court is that the attachment was dissolved by the insolvency proceedings in which the defendants made, and the proper court accepted, a surrender of all their property. It is apparent that the omission to carry this conclusion into the judgment so as to make it effective was inadvertent, and should be corrected in the judgment given in this Court.

The attachment dissolved, the Court has neither interest nor jurisdiction to inquire into the ownership of the property attached, and the intervention of Shwartz & Sons naturally falls.

The judgment of the Circuit Court should be reversed, with costs, to be adjudged against the H. B. Claflin Company and the cause remanded, with instructions to dissolve the attachment against H. Kern & Son, at their costs, and as of date December 6, 1892, and to dismiss the interven-

tion of A. Shwartz & Sons, at their costs, but without prejudice to any right the defendants, H. Kern & Son, or the syndic of the creditors of H. Kern & Son, insolvents, may have in, or to, or arising out of, the forthcoming bond given by intervenors in the case, and to otherwise proceed in the cause as law and justice may seem to require, but not inconsistent with the views expressed in this opinion, and it is so ordered.

A true copy:

[SEAL] Attest: J. M. McKEE, *Clerk.*

Supreme Court of the United States,

OCTOBER TERM, 1893.

No. ———

EX-PARTE THE H. B. CLAFLIN COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief in Behalf of Applicant for Writ.

The petitioner has made application for a writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit, in order to bring up for review before your Honors the judgment and decree of that Court, in Cause No. 159 of its docket, entitled A. Shwartz & Sons *et als.* vs. The H. B. Claflin Company; H. Kern & Son *et als.* vs. The H. B. Claflin Company.

The grounds upon which the applicant relies in his appeal to this Honorable Court for the exercise of a jurisdiction so seldom asserted by it, are:

1st. That the decision of that Court subjects petitioner, a citizen of the State of New Jersey, to the control and process of the Courts of the State of Louisiana, and denies to it the advantages of the laws of the State of Louisiana, asserted by it in the Federal Courts, thus depriving it of the substantial protection accorded it by the Constitution and laws of the United States, through a resort to said Federal Courts.

2d. That the error complained of in the decree of the said Circuit Court of Appeals was, in a great measure, brought about by a suggestion or dictum of one of the Justices of this Honorable Court in the decision in the case of Tua vs. Carriere, 117 U. S. 201, which dictum announced a doctrine unsanctioned either by the statute law or jurisprudence of Louisiana, and not supported by principle, and that this Honorable Court should announce its affirmance of said dictum, or withdraw the principle of the doctrine stated, in order that citizens of other States, asserting their rights in the Federal Courts of Louisiana, may be advised whether process of a State Court can impede, retard or deprive them of substantial legal rights in the Federal Courts, although they owe neither obedience nor allegiance to the State Courts from which said process emanates.

3d. That the decision of said Circuit Court of Appeals involves a question of general jurisprudence of the greatest importance to all litigants in the Federal Courts throughout the land, viz:

The construction of Section 933, of the Revised Statutes of the United States, when sought to be applied to cases where a writ of attachment is not technically dissolved, but merely *stayed* by the injunctive process of a State Court.

The petition applying for a writ in this case contains a very full history of the case, but, in addition thereto, we make the following statement of the case with full references to the printed records on file:

STATEMENT OF CASE.

On the 22d of February, 1892, The H. B. Claflin Company instituted an action at law against H. Kern & Son for the recovery of twenty-one thousand seven hundred and twenty-eight dollars ($21,728.00), with interest, as stated in the petition, for goods and merchandise sold to the latter firm.

The necessary averments being made in the petition, verified by the oath of plaintiff, and a bond, in amount and conditioned according to law, having been furnished, plaintiff obtained a writ of attachment against Kern & Son, and the Marshal, in execution of said writ, attached and took into his possession "all the goods, notions, etc., found in the dry goods store of H. Kern & Son, situated at the corner of Canal and Dauphine streets, of the City of New Orleans." (R. 7).

As an ancillary process, The Claflin Co. made A. Shwartz & Sons garnishees in said suit, and propounded to them certain interrogatories touching their indebtedness to H. Kern & Son. (R. 1 *et seq*). On the 23d of February, 1892, A. Shwartz & Sons filed in the said suit of The H. B. Claflin Co. vs. H. Kern & Son, their petition in intervention and third opposition, claiming to be the owners, by purchase from H. Kern & Son, of all the property attached, but in no manner questioning the claim of The Claflin Co. against H. Kern & Son, nor the regularity of the attachment proceedings. (R. 12). Their petition in intervention, among other matters, sets out that they "agreed with the firm of H. Kern & Son, of this City, to buy their stock of merchandise, with privilege of their lease, *provided they incurred no trouble thereby.*" (R. 13). On the same day that their intervention was filed (Feb. 23d, 1892), A. Shwartz & Sons filed their sworn answers to the interrogatories in garnishment propounded to them by The Claflin Co., and, in reply to the second interrogatory, they made answer :

"Yes, it is true the purchase price was to be paid cash, *provided they could obtain from Court proper authority so to do.* * * *" (R. 11).

The petition of intervention was ordered filed, and the Marshal was directed by the Court to release the attachment upon

intervenors giving bond in the sum of $22,000.00 (R. 12), which bond was furnished.

On the 25th of February, 1892, The H. B. Claflin Co moved to set aside the order to bond, on the ground and for the reason that the bond of release furnished by A. Shwartz & Sons was not such as was authorized by law (R. 16), which motion was made absolute on the 29th of February, 1892 (R. 17), whereupon, on the 1st of March, 1892, a new bond was furnished to the Marshal by A. Shwartz & Sons (R. 21), which bond was duly assigned to The Claflin Co. by the Marshal, on the 2d of March, 1892. (R. 22).

On the 4th of March, 1892, H. Kern & Son filed an exception of prematurity to the action of The Claflin Co. (R. 18) and likewise a motion to quash the attachment, urging five separate and distinct grounds therefor, the last ground of which was:

"That all and singular the allegations and averments of the petition and affidavit upon which the writ of attachment in this case issued, are untrue and false." (R. 19).

The exception of prematurity was overruled on the 24th of November, 1892. (R. 31). The motion to dissolve the attachment was submitted to a jury, duly impanelled to try the issue, on the 8th of April, 1892, and, after an exhaustive examination and a protracted trial, consuming eleven days, was finally given to the jury on the 27th of April, 1892, whereupon a verdict was returned in favor of The Claflin Co., maintaining the attachment (R. 28), which verdict was received by the Court and ordered recorded.

On the 30th of April, 1892, Kern & Son applied for a new trial on their motion to dissolve the attachmeut (R. 29), which motion, after submission to and consideration by the Court, was, on the 6th of December, 1892, refused. (R. 35).

On the 5th of March, 1892, The H. B. Claflin Co. filed their

answer to the intervention and third opposition of A. Shwartz & Sons (R. 19), and, on the 28th November, 1892, Kern & Son filed their answer to the petition of The H. B. Claflin Co. (R. 32).

On the 6th of December, 1892, A. Shwartz & Sons, as *intervenors*, moved the Court to dissolve the attachment on the ground that the attached debtor, H. Kern & Son, had, on the 28th of November, 1892, made a cession under the insolvent laws of the State of Louisiana. (R. 33). Subsequently, on December 12th, 1892, A. Shwartz & Sons repeated their motion to dissolve the attachment on this same ground, urging the same, in this latter motion, as *garnishees* (R. 61), and on the same day, December 12th, 1892, Victor Mauberret, claiming to be the provisional syndic of H. Kern & Son, filed a similar motion. (R. 34). To this motion of A. Shwartz & Sons, as *intervenors*, The Claflin Co. objected, on the ground that A. Shwartz & Sons, being without interest to attack or question the attachment obtained and relied upon by the plaintiff and maintained by the Court, could not be permitted to urge its dissolution—that this plea can be urged *solely* by the creditors, through, and by the syndic alone—that Shwartz & Sons were not claiming to be creditors of H. Kern & Son—and that there had, in fact, been no cession or surrender of their property by Kern & Son, nor was there any order staying proceedings against their person and property. (R. 68). As the garnishment proceedings against A. Shwartz & Sons were discontinued (R. 79), their motion, as *garnishees*, fell, and was no longer considered.

To the motion to dissolve made by Victor Mauberret, claiming to be provisional syndic of H. Kern & Son, the H. B. Claflin Co. excepted on the grounds that the decree of the Civil District Court for the Parish of Orleans, of date November 28th, 1892, ordering H. Kern & Son to make a surrender, had been by judgment of that Court, rendered and signed on the 9th of De-

cember, 1892, "revoked, annulled, cancelled and set aside," and the order appointing Victor Mauberret as provisional syndic "recalled, cancelled, annulled and declared of no force or effect whatsoever" (R. 40); and a certified copy of the decree of Court to that effect was annexed to and made part of the said exception. There was subsequently filed the opinion and decree of the Supreme Court of the State of Louisiana, affirming the said judgment of the Civil District Court revoking the insolvent proceedings of November 28th, 1892, and recalling the appointment of a provisional syndic thereunder. (R. 72).

On the 6th of December, 1892 the cause as against H. Kern & Son was taken up and submitted to a jury, but, by agreement of counsel (R. 33), the trial of the intervention of A. Shwartz & Sons was postponed to a later day. The verdict of the jury in the cause, as against H. Kern & Son, was in favor of the H. B. Claflin Company for the amount claimed in its petition, and with "privilege of attachment." (R. 36).

Dissatisfied with this verdict, H. Kern & Son, on the 8th of December, 1892, applied for a new trial (R. 37), whereupon the Court, on the 28th of December, 1892, "ordered that the verdict of the jury and the judgment thereon be vacated, annulled and set aside, and a new trial be granted, for the reasons assigned in writing," which reasons will be found at R. 61.

Subsequently, on the 9th of January, 1893, a jury being waived, the cause as against Kern & Son, on the petition of The H. B. Claflin Co., and the action of A. Shwartz & Sons on their petition of intervention and third opposition, were taken up and tried by the judge, and were finally argued and submitted on the 3d of March, 1893.

On the 3d of March, 1893, but after the argument had closed and the cause had been formally submitted to the Court (Bill of Exceptions, R. 109), H. Kern & Son asked leave of Court to file

what counsel denominated a "motion and suggestion," that they had made a surrender under the insolvent laws of the State. (R. 97). On objection of The Claflin Co. to the right of H. Kern & Son to file this "motion and suggestion," basing their objection on the following grounds:

1. Because the said paper or document is neither motion, exception, plea nor answer, nor any legal document known to the practice, but is a mere suggestion, of no more force and effect than if orally made.

2. Because the defendants, H. Kern & Son, if, indeed, they have made any cession, as is suggested in said paper, cannot be permitted to urge the same, the syndic being the only person permitted by law to either suggest or plead the same.

3. Because, inasmuch as the instant case had already been tried, argued and submitted, the filing of any such "alleged motion and suggestion was not now permissible (R. 109), the Court took the matter under advisement, and on the 22d of April, 1893, the day when the case was decided on its merits, the Court permitted the "motion and suggestion" to be filed. (R. 98).

After trial, argument, and submission of the cause, Emile Kern, one of the co-partners of H. Kern & Son, died, and his heirs were regularly cited. (R. 86-7).

Upon these pleadings, and upon the facts found by the judge before whom the cause was tried (R. 88, *et seq.*), the United States Circuit Court for the Eastern District of Louisiana rendered judgment in favor of the H. B. Claflin Company against H. Kern & Son, and in solido against Henry Kern, and against the legal heirs and representatives of Emile Kern, in the full sum of twenty-one thousand, seven hundred and twenty-two dollars ($21,722.00), with interest upon the amounts, and from the dates set forth in the said judgment (R. 96-7), and further decreeing that the agreement "of February 20th, 1892, did not

transfer to the intervenors, A. Shwartz & Sons, the property attached, so as to affect the rights of the plaintiffs, as attaching creditors of the defendants herein, and that said intervention be, and the same is hereby dismissed at intervenors' costs.

From this judgment a writ of error was prosecuted by A. Shwartz & Sons to the Honorable, the Circuit Court of Appeals, which reversed said judgment, and decreed as follows:

"The judgment of the Circuit Court should be reversed, with costs to be adjudged against The H. B. Claflin Company, and the cause remanded, with instructions to dissolve the attachment against H. Kern & Son, at their costs, and as of date, December 6th, 1892, and to dismiss the intervention of A. Shwartz & Sons, at their costs, but without prejudice to any right the defendants, H. Kern & Son, or the syndic of the creditors of H. Kern & Son, insolvents, may have in, or to, or arising out of the forthcoming bond given by intervenors in the case; and to otherwise proceed in the cause as law and justice may seem to require, but not inconsistent with the views expressed in this opinion."

The Court thus decided that writs of attachment emanating from the Federal Courts in the Eastern District of Louisiana are dissolved under Section 933 of the Revised Statutes of the United States, in consequence of a surrender in insolvency, under the State insolvency laws, by the debtor or defendant in the cause, and in consequence of the stay order granted in the insolvency proceedings.

In this, applicant claims that said Court erred, inasmuch as there is neither statute law nor jurisprudence in the State of Louisiana whereby a writ of attachment *qua writ* is affected or disturbed in consequence of insolvency proceedings in the State Court; that said Honorable Court of Appeals erred in not according to petitioner the advantages and benefits incidental to its primary cause against Kern & Son, and that Section 933 of the Revised Statutes

of the United States provides for the dissolution of writs of attachment under the laws of a State, and does not provide, nor is said Honorable Court of Appeals authorized or justified in interpolating into the statute another and additional mode of disturbing the writ, when properly obtained and maintained, by holding that it was suspended in consequence of an order emanating from a court of foreign jurisdiction, and, in consequence of said suspension, practically dissolved; that the said Federal Courts owe neither obedience nor allegiance to the State Courts, nor are they subject to the process of such courts, nor can their jurisdiction be interfered with or controlled by any order emanating from such Courts, nor are their suitors affected or controlled by such State Courts in the exercise of their constitutional rights, if, in other respects, they be not subject to the jurisdiction of said Courts.

ARGUMENT.

The Revised Statutes of the United States, Section 933, provide as follows:

"An attachment of property, upon process instituted in any Court of the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the laws of the State where said Court is held, such attachment would be dissolved upon like process instituted in the Courts of said State;

"*Provided*, That nothing herein contained shall interfere with any priority of the United States in the payment of debts."

The Revised Statutes of the State of Louisiana, Section 1790, provide as follows:

"When issuing the order for the meeting of the creditors, the judge shall order that all of the proceedings as well against the person as against the property of the debtor be stayed."

The initial question submitted to the Court is whether a cession, under the State insolvent laws of the State of Louisiana, made ten months subsequent to the levy of an attachment by the National Courts, and after the property attached has been released on bond, furnished by intervenors who set up title to the property attached, dissolves the attachment.

It is insisted by the respondent litigants and held by the Honorable the Circuit Court of Appeals, that, under Section 933, Rev. Stat. U. S., whenever a contingency arises, which, under the State laws, dissolves the attachment in the State Courts, it shall have a like effect in the Courts of the United States; and it is claimed that an attachment is dissolved after a cession, under the laws of the State of Louisiana, in the State Courts, and that, hence, a like consequence follows as to such writs issuing out of the Courts of the United States in the State of Louisiana.

It will be borne in mind that the statute in question (R. S., §933,) refers specially to the "laws" of the State, and we concede that, if there be any statute of the State of Louisiana which declares that a cession by the debtor dissolves the attachment, unquestionably a like result must follow such writs running out of the Federal Courts. But we deny that any such *law* exists, or that the Louisiana Courts have ever so held. We are not unmindful of the fact that, under the insolvent laws of Louisiana, a writ of attachment is usually rendered ineffectual and unavailing after a cession by the debtor, but this by no means results from the mere fact of the cession itself, but solely from exercise of the power, which is vested in the Court accepting the cession, of making an order staying both the institution or further prosecution of suits of any nature whatsoever, whether of attachment or otherwise, against one whom the law declares "civilly dead"—that is, of making the order "staying proceedings against the person and property of the debtor." Rev. Stat. of Louisiana, 1790.

Under the Louisiana law, no privilege results from the attachment alone, "until those who have made it have obtained a judgment and order of execution" (C. P. 724); and, inasmuch as the "stay order," which the insolvent may obtain, prevents the obtention of a judgment on the main or principal demand, or the execution of the judgment if one has already been obtained, no benefit accrues to the creditor from his attachment.

While it rarely happens that a debtor, making a surrender, fails or omits to obtain the "stay order," it is none the less the law, that the failure to obtain such order enables the prosecution of suits and the running and maintaining of attachments against the debtor, *notwithstanding his cession* and its acceptance by the Court.

Rare though it be, there is at least one reported case, where a cession was made, in which the insolvent omitted to obtain the "stay order." *In that case the writ of attachment was maintained against him.* See Fisk vs. Chandler, 7 Martin (O. S.), where the Court held:

"But the defendant's counsel contends that one of the creditors of an insolvent has no privilege, and cannot attach his property, which must remain liable to the claims of all generally. As long as proceedings at law against a debtor's person and property have not been stayed, any of his creditors may resort to either for the payment or security of his debt."

As a further illustration of the correctness of our contention, that it is the "stay order" which renders ineffectual the attachment, and not the mere fact of cession, we cite the case of Clark vs. Wright, 5 Martin (N. S). 123, where the Court held, that, *quoad* creditors who were not placed on the bilan, the order was inoperative, and that they could proceed both against the person and property of the debtor. In that case, the Court held:

"The terms in which the orders on insolvents' petitions are

drawn up by the Judges of the first instance, though sanctioned by long usage, are not so precise and correct as could be desired. They almost universally direct that *all proceedings* be stayed against his person and property, though, as it is well known, they do not operate a stay of *all* proceedings, but only the proceedings of those who may be placed on the bilan. It would be much better if they would direct that all proceedings against the person of the insolvent by the creditors placed on the schedule should be stayed. Had that been done here, the action would, most probably, not have been heard of. The apparent inconsistency, however, between the words of the order and its real effect cannot avail the defendant. It was his duty to know the law, and that the stay of proceedings could only have effect against those whose names were on the *bilan*."

This clearly demonstrates that it is the "stay order," and not the mere fact of the cession, which renders ineffectual the attachment. Now, to what extent, if any, is the "stay order" of the State Court an obstacle in the United States Courts?

The latter Courts do not yield their distinct sovereignty to that portion of the "stay order" which stays proceedings against the *person* of the debtor. No one questions the right to proceed to judgment *in personam* against a bankrupt debtor. On what theory, then, is it pretended that so much of the order of the State Court as stays proceedings against the *property* of the debtor is operative in the United States Courts, and that they must relinquish their hold upon property held by them anterior to the cession? It is no answer to this to say, "The statute." The statute (Art. 933, U. S. Rev. Stat.) makes no provision for the dissolution of the writ by reason of a "stay order" from a State Court, and if it did, it would be illogical to say that the sovereignty of the United States Courts is to yield to the "stay order," so far as it affects the "property," but not so far as it

affects the "person." To hold that the Courts of the United States must yield to this "stay order," is to decide that the rule of comity, rockbedded in the jurisprudence of this country, that the Court which first takes hold of the *res* is to maintain it to the end of the controversy, is to be waived and set aside by the National Courts, in humble deference to a "stay order" of a State Court. Rather will the Court say, as was said by Mr. Justice Field in Rio Grande R. R. Co. vs. Gomilla, 132 U. S. 478:

"The jurisdiction of a Court of the United States, once obtained over property by being brought within its custody, continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the State, or by any proceedings *subsequently* commenced in a State Court. This exemption of the authority of the Courts of the United States from interference by legislative or judicial action of the States, is essential to their independence and efficiency. If their jurisdiction could in any particular be invaded and impaired by such State action, it would be difficult to perceive any limit to which the invasion and impairment might not be extended. To sanction the doctrine for which the executor, appointed by the Probate Court for the Parish of Orleans, contends, would be to subordinate the authority of the Federal Courts in essential attributes to the regulation of the States, a position which is wholly inadmissible."

It is said that The Bank of Tennessee vs. Horn, 17 How. 157; Tua vs. Carriere, 117 U. S, 201, and Geilinger vs. Phillippi, 133 U. S. 246, and the Louisiana authorities therein quoted, are against us on this proposition. A careful examination of these authorities will show that the question here presented did not arise in any of these cases. The persistency and insistency with which these cases are quoted against us, and the fact that they appear to be not alone the chief, but the sole reliance of the

plaintiffs in error, require us at the risk of extending this brief to a greater length than we had contemplated to fully review them.

In Bank of Tennessee vs. Horn, 17 Howard, 157, the facts were as follows:

Peter Conery, on the 7th of November, 1851, made a cession under the insolvent laws of Louisiana, which cession was accepted by the Court for the benefit of his creditors; and an order was made staying all proceedings against his person and property. At a subsequent date, a meeting of creditors was held, and a syndic duly appointed.

At the time of the cession, a suit of The Bank vs. Conery, was pending in the U. S. Circuit Court. The Bank proceeded in its suit and obtained judgment against Conery, which judgment was rendered *after* the cession had been accepted and the syndic appointed. In execution of this judgment, the Marshal seized certain property of the defendant, Conery, and at the Marshal's sale, the Bank became the purchaser and obtained possession of the property so sold.

The syndic of Conery, having obtained proper orders to that effect from the State Court, offered the same property for sale, and Horn became the purchaser. Thus, there were two claimants for the same property—the Bank (plaintiff in error) claiming title by virtue of the Marshal's sale, and Horn (the defendant in error) claiming title by virtue of the syndic's sale. Horn then instituted his suit against the Bank for the property, claiming that, from the moment of the cession by Conery, all the property of the latter was, under the textual provisions of the insolvent laws of the State of Louisiana, fully vested in his creditors; that, hence, when the Bank obtained judgment against Conery, the latter had no interest in the property in question upon which the judgment could be a lien, or which could be seized upon an

execution issuing upon the judgment. The Court held with Horn, basing its judgment squarely and solely on the ground that Conery had, *at the time the execution issued*, no seizable or other interest in the property.

In Tua vs. Carriere, 117 U. S. 201, it appears that on the 16th of July, 1884, A. Carrierre & Sons made a cession of all their property to their creditors, in the Civil District Court for the Parish of Orleans, and J. M. Seixas was duly appointed syndic. *Subsequent* to the cession—to-wit., on the 18th of August, 1884—Tua instituted suit against A. Carriere & Sons in the Circuit Court of the United States, and obtained a writ of attachment, under which writ the Marshal levied upon certain property, belonging to the Carrieres. On the 18th of August, 1884, Seixas, the syndic, intervened in the cause, and setting up the cession of A. Carriere & Sons, claimed that, as such syndic, he had, *at the time of the levy* by the Marshal, under the writ, "title and right of possession to the goods seized by the Marshal, and that the property was not subject to attachment."

Tua, the attaching creditor, filed his answer to the intervention of the syndic, in which answer "he denied that the latter was the syndic of Carriere & Sons, averred that the property attached was in the hands of the U. S. Court, and that Seixas never had any control over the same, and had no right to disturb the possession of the U. S. Court."

Upon the issues thus raised, the case was tried. It will be observed, at a glance, that the sole question presented for decision on this state of facts was that of title *vel non* to the property attached—the syndic contending that title to all the property of the debtors was fully vested in the creditors *eo instanti* the cession was made and accepted, and, therefore, not liable to seizure; the attaching creditor, on the contrary, insisting that this conten-

tion was not well founded in law, and that, in point of fact, the syndic never had any control over the property.

Basing the decision on the authority of Nimick et als. vs. Ingram, 17 La. An. 85, where the Supreme Court of Louisiana held, that "the acceptance, for the creditors, by the Court, of the ceded estate, vests in them all the rights of property of the insolvent, whether placed on the schedule or not;" and on the settled jurisprudence of the State on that proposition, Mr. Justice Woods held, that the syndic was in possession of the *res* at the *time of Tua's attachment*, and the property being *at the time* in the possession of one Court for administration, it was not liable to seizure from another. The whole theory upon which the case turned was:

1. That the insolvent Court first had possession of the *res*.

2. That from the instant of a cession under the State insolvency law, the title to the property of the insolvent is vested in his creditors, and is hence thereafter no longer liable to seizure for a debt of the insolvent bankrupt debtor.

3. That the State Court being first in possession of the *res*, the rule of comity which prevails among the Courts of this country, prevents the seizure, by another Court; and this latter doctrine is but a reaffirmance of the well known rule laid down in Freeman vs. Howe, 24 How. 450, and Buck vs. Colbath, 3 Wall. 334; both of which authorities are quoted by the Court.

Your Honors will thus notice that the question whether, under the State law, an attachment is dissolved by a cession, was not in any manner involved in the Tua case, and did not receive decision.

True it is that the opening paragraph of the opinion says:

"It is not disputed that, if the insolvent law of Louisiana was a valid law, and the surrender made by the surviving partners of the dissolved firm of Carriere & Sons was a valid surren-

der of the effects of the firm, the attachment of the plaintiff was rightfully dissolved. For, under the law of Louisiana, the effect of a cession of property by an insolvent person is to dissolve all attachments which have not matured into judgments;" but this declaration by the Court was, in the first place, purely and simply *obiter;* in the second place, it was based on an admission of counsel as to what the law of Louisiana is, and is of no authority or binding force, except as against the parties making the admission; and, thirdly, the authorities quoted by the Court in support of that doctrine, to-wit: Code of Practice, 724; 12 Martin, 323; 3 Rob. 457; and 17 La. An. 39; do not bear out the Court, as we will now demonstrate. C. P. Art. 724, is as follows:

"Attachments and sequestrations give no privilege to those who have made them, until they have obtained a judgment and order of execution on the property sequestered or provisionally seized," and which, we submit, has no application to the question under consideration:

In Hanna vs. Creditors, 12 Martin, 32, it appears that Ronaldson ran an attachment against Hanna on the 16th of August, 1820, and, on the following day, Hanna made a cession and obtained a "stay order," staying proceedings against his person and property. It seems, either that no property was attached under the writ, or that, if any property was attached, it was turned over to the syndic and by him sold; for the entire contest in this case was in a *concursus* on a tableau of distribution made by the syndic. Ronaldson, having no judgment against his debtor, Hanna, and, consequently, no recognition of his attachment, claimed to be paid by privilege out of the funds in the syndic's hands, as an attaching creditor. The Court denied his claim, with the simple remark that:

"The attachment sued out by Ronaldson cannot avail him. We think, with the Superior Court of the late territory, that an attachment gives no lien in case of defendant's failure."

This ruling was not made on the theory that, under the *law*, a cession dissolved the attachment, but was made under the authority of Marr vs. Lartigue, 2 Martin, 88, cited by the Court, that the attachment resembled the *praetorian pignus* of the Romans, and that the latter, in case the debtor had not sufficient property to discharge all his debts, did not avail to the exclusion of the co-creditors.

Fisher vs. Vose, 3 Rob. (La.) 457, is also quoted in the Tua case as supporting the doctrine that, under the law of Louisiana, an attachment is dissolved by the cession; and the fact that this case, in the "hotch-potch" of authorities "not disputed by counsel," is relied upon by the Court in support of the doctrine it announces, but emphasizes the fact that the learned Judge who decided the Tua case made no examination of the State authorities which he quoted, but accepted from the counsel the admission that the law of Louisiana was as announced by the Court, and that the authorities quoted sustained that view.

Fisher vs. Vose not only did not involve the question presently presented, but, indeed, no State law of any nature whatsoever was construed or interpreted. In that case both the plaintiff and the defendant were non-residents. The plaintiff sued out a foreign attachment in the State Court, and made two parties, residing in Louisiana, garnishees. Several days after the running of the attachment, the defendant filed his petition in the District Court of the United States, sitting in Boston, praying to be declared a bankrupt under the Act of Congress, approved August 19th, 1891, establishing a general bankrupt system throughout the United States. The counsel appointed to represent the absent defendant plead this surrender as a bar to the suit, and the Court held that, from the filing of the petition in bankruptcy, all proceedings against the bankrupt must be *suspended* for a reasonable time, to enable him to file the decree and make the assignee a party.

Collins vs. Duffy, 7 La. An. 39, also quoted in the Tua case, simply holds that, where a defendant, after attachment, but before judgment, dies in this State, and his succesion is administered here, no privilege is given by the attachment *alone*. These are all the authorities on which the Court, in Tua vs. Carriere, says:

"It is not disputed that, if the insolvent law of Louisiana was a valid law, and the surrender made by the surviving partners of the firm of Carriere & Sons was a valid surrender of the effects of the firm, the attachment of the plaintiff was rightfully dissolved. For, under the law of Louisiana, the effect of a cession of property by an insolvent person is to dissolve all attachments which have not matured into judgments."

But, be all this as it may, the main fact remains that the decision in Tua vs. Carriere was based on the correct theory that the property of the Carrieres had been surrendered to their creditors, and was in *gremio legis* in another Court, long *prior* to any levy under the writ of attachment from the Federal Court, and that comity prevented its being taken from the custody of the Court which *first* held it under due process.

To precisely the same import, and controlled by the same considerations, is Geilinger vs. Phillippi, 133 U. S. 246. In that case, Green made a surrender under the insolvent laws of Louisiana. *Subsequently*, Geilinger obtained a judgment against him in the United States Circuit Court, and proceeded to execute it by seizing certain property standing in the name of Green's wife. The syndic did not claim this property, as belonging to the insolvent, until this seizure was run, whereupon he set up title to the property for the creditors of Green. The Court held that the property was not Mrs. Green's, but was that of the insolvent, and was vested in the creditors, and that, although not on the schedule filed by the insolvent, still it was *constructively* in possession of

the syndic from the moment of the surrender, and that consequently no subsequent levy could be made on it under writ from the United States Circuit Court.

The only case which can be found in the books, where it has ever been held that a Louisiana attachment, running out of the Circuit Court of the United States, is dissolved by a *subsequent* cession of the debtor, is that of Lafollye vs. Carriere, 24 Fed. Rep. 346. In that case the United States Circuit Court held:

"The effect of such cession and proceedings thereon was to stay and *practically* dissolve all attachments then issued against the said surrendering partners and all property surrendered, in the State Court, by the *direct operation of State laws*, and in the National Courts, by force of Section 933, Rev. Stat."

By the direct operation of *State laws!* What laws? The statutes may be searched in vain for any such law. True it is, as already shown, under the Louisiana system, an attachment may be rendered unavailing after a cession is made, but this is not because the cession dissolves it, but simply because the attachment gives no privilege until the suit is sent to judgment and execution issues. The suit cannot go to judgment, *not because of the cession*, but because of the order "*staying proceedings against the person and property of the debtor;*" no such staying order, as already shown, having any force or effect in a foreign tribunal.

Another consideration suggests itself in the instant case, the facts of which case are unlike, in a marked degree, those of the Lafollye case. (24 Fed. Rep 346). It must be borne in mind that, in the Lafollye case, the Marshal still held in his hands the property attached, whereas, in the instant case, the property attached was released long prior to the cession, upon a bond furnished by the intervenors and third opponents, A. Shwartz & Sons.

In the Lafollye case, the learned Judge who read the opinion was guarded in the language he employed in setting aside the attachment. "Stayed and *practically* dissolved," is the language. The idea which seems to have controlled the decision was that the attachment was not dissolved by the cession, but that the *writ* is suspended in its operation upon the *property* of the defendant; and that, therefore, in the Federal Court, where the plea is formally interposed, the *writ* is not dissolved to such an extent as would justify its return by the Marshal, although the *property* held under its operation is released, in order to have it administered in the State Court charged with the administration of the property of the insolvent. This we understand to be the scope of the Lafollye decision, for if the writ, by the mere cession, was dissolved, the Marshal would have been justified in returning it into Court, coupled with the declaration in the body of the return that it was dissolved in consequence of the cession. This he could not do, and the Court, we have no doubt, never intended that the effect of its decision was to reach that far. It was not intended that the Marshal should return the *writ*, although the Court ordered the release of the *property* subject to its operation.

Illustrative of what we here say, let us assume that a writ issued; that subsequent to its operation upon the property of the defendant, he makes a surrender; that the property is released; that upon full administration of his affairs he is discharged; that he acquires other property after his discharge—*query*, could the writ in the Marshal's hand be applied or made operative upon this newly acquired property, and, if so, why? Undoubtedly it could, and this is because that writ is still in operation, and, until set aside, it would be full authority and justification for the Marshal to let it operate upon the newly acquired property. This could not be done—that is to say, the Marshal would not be justified in operating his writ—after the property had

been bonded, because then the writ, from that moment, is inoperative; and the principal and surety, as is stated in the bond in this case, are liable for such "judgment as may be rendered herein.

Therefore, we submit that the writ is not dissolved by the cession, but its operative force upon the property of the defendant in a State court may be suspended, and the property released in consequence of the insolvency.

Now, if this is so, then there can be but one judgment releasing the property, and we submit that when the defendant or the intervenor, upon his application, bonds the attachment, the property is thrown back into the possession of the defendant, subject to his control and disposition, and there is then nothing left for the Court to deal with except the rightful issuance of the writ at the time, with the right in the plaintiff by proper proceedings upon the maintenance of the writ to look to the bond.

If it be contended that the bonding is not such a release of property as precludes inquiry as to the rightful issuance of the writ by reason of the falsity of the affidavit upon which the writ was obtained, then we answer that that latter issue was specifically tendered in this cause. A formal motion was made by the defendants to dissolve the attachment on the ground that the allegations and the affidavit of the plaintiffs' petition were false. This issue was submitted to a jury (March, 1892), the verdict of the jury was in favor of the plaintiff maintaining the writ, and an application for a new trial, after argument, was refused by the Court. Nothing could be accomplished in this proceeding, at this time, by holding that the writ should be dissolved by the cession, because, it is a matter of record in the case, as already shown, that there is no property of the defendants held by the Marshal under his writ. In every case to which your Honors may be referred, there was, at the time of the plea, by the syndic,

of the cession, the specific property attached in the Marshal's possession, and held subject to the writ of attachment; and the Court, in the Lafollye case, in entering the decree in the cause, says: "All costs of the attachment should be paid by the syndic intervening, before the PROPERTY attached is SURRENDERED."

In this Lafollye case, as in the other cases, there was property in the custody of the Marshal, the writ of attachment operating upon it, and in order to enable the syndic to obtain possession of the property the judgment directs that before possession be given, he pay the costs leading up to the attachment.

Suppose that the lower Court, in the instant case, had made a similar order as was made in the Lafollye case; that upon payment of the costs herein, the Marshal be directed to deliver to the syndic of H. Kern & Son the property attached and in his possession, how could such an order be obeyed? The Marshal might receive the fees, but he would have no property to deliver, and the Court would be ordering a vain thing. Courts will not decide abstract propositions of law that can have no practical effect between parties litigant, and make decrees that are not susceptible of execution. This is what the Court would be doing if a similar decree, as in the Lafollye case, was made in this. As already stated, the Marshal is not in possession of the property, the same having been turned over to Shwartz & Sons upon their giving bond, and the bond having been assigned to The H. B. Claflin Co.

The cases referred to are manifestly distinguishable from the case at bar. The Marshal parted with possession of this property on the 24th of February, 1892. Since that date, he has never been in possession of one dollar's worth of the defendant's property. Therefore, there is nothing for him to surrender.

It is said that the theory upon which Sec. 933, U. S. Revised Statutes is based, and the object it seeks to attain, is to maintain

an equality among all the creditors and to put them on the same footing, *quoad* property attached, when a debtor makes a surrender under the insolvent laws of the States. Grant, for the argument, that such is the theory and purpose of the section in question. How can such a contingency possibly arise under the issues raised and the facts existing in the case at bar, and with only The Claflin Co. (the complaining creditor), H. Kern & Son (the debtors), and A. Shwartz & Sons (the intervenors and third opponents, claiming title to the property attached), before the Court? It is these parties, and they alone, who can possibly be affected by any issue raised, or question of law mooted in the case. With the rights of or injury to others not before the Court, the Court cannot be concerned. But, assuming the Court will look to the interest of those not before it, and that the spirit or intent of Sec. 933, R. S., is as is claimed for it, and that its effect on the creditors of Kern & Son is to be considered—what then? It is an axiom of the law that when the reason for or object of the law ceases to exist, the law itself ceases to be applicable. Hence, it is pertinent to the discussion of the statute in question, under the claim that is made as to its intent and spirit, to ascertain whether applying it to the facts of the instant case, any such alleged "equality" between the creditors of H. Kern & Son can possibly arise *quoad* the property attached, as a result of the dissolution of the writ of attachment. For, if we can show that no such result can possibly follow the dissolution, then have we established that the section under discussion is not applicable to the case at bar, and that the writ ought not to be dissolved; for we assume that no Court will make any decree on any plea which not alone cannot inure to the benefit nor result to the detriment of the parties setting up the plea, but cannot affect, in any manner, even those not before the Court. Nor will it do so when its judgment on such pleas is not susceptible of being executed and carried into effect.

We, therefore, submit, without fear of successful refutation, that a decree, either maintaining or dissolving the attachment, can neither legally benefit nor injure A. Shwartz & Sons, H. Kern & Son, nor the creditors (exclusive of The H. B. Claflin Co.), nor the syndic of H. Kern & Son.

So far as A. Shwartz & Sons are concerned, they may be dismissed wiih the simple statement that they are in no manner concerned in this question. As opponents and intervenors, they seek to recover the property attached as belonging to them, setting up title in themselves. Their suit, in the language of Art. 238, C. P. (La.) "shall be considered as a separate demand, distinct from the suit in which the order was granted." If they establish title to the property attached, they will be adjudged the owners thereof and entitled to the same, whether the attachment is maintained or dissolved. If they fail in showing title, it is still less any concern of theirs what disposition is made of the writ.

As to H. Kern & Son, their contention is that the sale by them to A. Shwartz & Sons is a valid one. This is their judicial admission. In no event, whatever might be the decision of the Court as to the title of A. Shwartz & Sons *quoad* The Claflin Co., can Kern & Son ever be declared to have title in the property as against Shwartz & Sons. Between Kern and Shwartz, the title in the latter is perfect. Besides this, if Kern & Son have made a cession of their property, whatever rights they may have inure to the creditors represented by the syndic; hence, Kern & Son may be dismissed from further consideration; and this brings us to the consideration of the syndic's interest in the question at issue.

Pretermitting, for the purpose of this discussion, the fact that the syndic of Kern & Son is not before the Court, either asking for the dissolution of the writ or appearing for any other purpose whatsoever, we will now consider how or in what manner can either the dissolution or maintenance of the writ benefit or injure

his principals, the creditors. The fact must not be lost sight of that the property attached is no longer in the possession of the Marshal; that the intervenors, A. Shwartz & Sons, claiming title thereto, released it on bond; that the bond was assigned to The Claflin Co., and that Kern & Son make no claim of title to the property, but insist that the sale thereof to Shwartz & Sons is valid. The Court will also bear in mind that if the sale from Kern & Son to Shwartz & Sons is set aside and declared of no validity, it can only be set aside and avoided *"as to its effect on the complaining creditors," The H. B. Claflin Co.*, for however invalid, fraudulent, or imperfect it may be as to the Claflin Co., it is, under the Louisiana laws, *good as to all other creditors who do not successfully attack it*, and that is so under the textual provisions of the law. We quote:

"The law gives to every creditor, where there is no cession of goods, as well as to the representative of all the creditors where there is a cession or other proceedings by which they are collectively represented, an action to annul any contract made in fraud of their rights." C. C. (La.) Art. 1970.

"The judgment in this action, if maintained, shall be that the contract *be avoided as to its effect on the complaining creditors*, and that all the property or money taken from the original debtor's estate, by virtue thereof, or the value of such property to the amount of the debt, *be applied to the payment of the plaintiff*." C. C. (La.) 1977.

Thus, your Honors will perceive that in no event can the sale from Kern & Son to Shwartz & Sons, in the suit at bar, be set aside or avoided beyond *"its effect on the complaining creditors,"* so that, therefore, The Claflin Co. would be the sole beneficiaries of a judgment declaring Shwartz & Sons to be without title to the property attached.

Now, the Court will hold that the title of Shwartz & Sons to

he property attached is either good as against the world, or is not good *solely* as to "its effect on the complaining creditors," The Claflin Co. *In either event, how would, or could the other creditors of Kern & Son be either benefitted or injured by the attachment being either dissolved or maintained?* If Shwartz's title is good, even as against The Claflin Co., then the matter is ended, and there is no property to go to the syndic, inasmuch as it is, in this event, declared to be Shwartz's; there is no bond to go to the syndic, because then Shwartz's bond is cancelled, and he and his surety are released from all liability thereon.

If, on the other hand, the Court holds that Shwartz's title is not good so far as "its effects on the complaining creditors" are concerned, the syndic does not then take the property; firstly, because it is no longer in the hands of the Marshal; and, secondly, because the sale is held invalid *only so far as The Claflin Co. is concerned, but good as to all the other creditors who have not successfully attacked the sale.* It is only when the contract is avoided by the action of the syndic, acting for all the creditors, that the avoidance inures to their benefit. Then, the title being declared to have always been in the debtor, so far as all his creditors are concerned, the property is taken for their benefit by the syndic, in case of a cession by the debtor. Neither Kern & Son, nor their syndic, nor their creditors (except the complaining creditor, The H. B. Claflin Co.) make any pretension, or claim that the sale from Kern to Shwartz is invalid, or should be avoided—and certainly A. Shwartz & Sons do not.

As we have shown, the property is no longer in the hands of the Marshal, A. Shwartz & Sons having released it on bond. This bond stands in lieu of the property, *only so far as The H. B. Claflin Co. is concerned*, and no one but that company could maintain an action thereon if it succeeds in avoiding the sale in question, for the avoidance of the sale would inure solely to its

benefit. We submit that we have clearly shown that neither the creditors individually, nor the syndic of H. Kern & Son, have any concern in this particular question, nor can they be either injured or benefitted by the attachment being maintained or dissolved; and thus we have demonstrated that even under what is claimed to be the intent and spirit of Section 933, no benefit or injury can result to the syndic.

To summarize: If the attachment is maintained, The Claflin Co. could recover on the bond furnished by Shwartz & Sons, whereas, if the attachment is dissolved, neither Kern, nor the creditors, nor their representatives, the syndic, would have any recourse whatsoever on that bond. The Court would hence be making a decree which would give the syndic neither the property nor recourse on the bond, and this very result but emphasizes the correctness of our proposition that, after the property is released on bond and has passed into the possession of either the defendants or the intervenors, a subsequent cession of the debtor does not have the effect of dissolving the writ. A dissolution of the writ could only have the effect of leaving Shwartz & Sons in the possession of the property, and the creditors of H. Kern & Son (other than the H. B. Claflin Co.) without any recourse on the bond whatsoever.

In this connection, we desire to call your Honors' especial attention to the case of Miller vs. Townsend, 7 La. An. 633, where it was held that a revocatory action could be maintained by an individual creditor, notwithstanding the cession, if the action was instituted prior to the cession, and that the "fruits of the plaintiff's vigilance and diligence" cannot inure to the mass of the creditors. The Court, at that time, was composed of Louisiana's great Justices, Eustis and Ross and Slidell and Preston and Dunbar.

This case has a direct bearing on and application to the case at

bar, and its careful consideration is pressed upon your Honors. The facts in that case are these:

Plaintiffs had a judgment against C. H. Miller. Mrs. Miller had a judgment against her husband, which judgment standing in the way of plaintiffs' means of making their money, they sought to annul by the revocatory action. Plaintiffs were successful in their attack on Mrs. Miller's judgment, but, to quote the language of the Court, "it appears that, in the interval between the date of the rendition of the judgment of the plaintiffs against the wife, and the signing of it, Miller, the debtor, made a surrender of his property, which was accepted by the Judge." The wife appealed from this judgment. "The suit," said the Court, "was conducted exclusively by the plaintiffs and in their name, *the syndic being no party to it.*" The learned counsel for Mrs. Miller (Durant & Hornor) insisted, as do the counsel for intervenors in the instant case, that from the moment of Miller's cession and its acceptance, all the property vested in his creditors; that Miller, who was a necessary party to the action of nullity, was "civilly dead," and could no longer stand in judgment, except by and through his syndic; that this necessary party being no longer before the Court, no decree could be made on the subject-matter of the suit; that the cession stayed all proceedings against his person and property, and no further action could be taken in the cause—in fact, all that is contended for by A. Shwartz & Sons in the instant case, was urged by Mrs. Miller in the suit referred to. But the Court, speaking through Mr. Chief Justice Eustis, held that plaintiffs, *notwithstanding the cession of their debtor, could maintain their action, and were entitled to the fruits of "their vigilance and diligence;" and that no benefit resulting therefrom could be claimed by the syndic, who was no party to the suit.* This is the language of the Court:

"Where a creditor, on his own responsibility, and at his

own costs, prosecutes an action to avoid a fraudulent sale made by an insolvent, *the benefit resulting from the action cannot be claimed by the syndic*, who is no party to it. *It inures entirely to the creditor by whose vigilance it was obtained.*"

An able brief for a rehearing was submitted in the case, and is printed at page 534 of the same volume, but the rehearing was unanimously refused. To the same effect is the case of the State ex rel. Cohen vs. Judge, 41 La. An. 431, and also 33 La. An. 803, and 39 La. An. 505, 834.

The action pending in the case at bar, so far as the issue between The H. B. Claflin Co. and A. Shwartz & Sons is concerned, is the revocatory action. By it, the Claflin Co. seek to avoid and set aside the sale to A. Shwartz & Sons from H. Kern & Son. Prior to July, 1886, this action could only be instituted by direct action on the part of the complaining creditor, brought jointly against his debtor and the party with whom the contract sought to be avoided was made. In 1886, a marked change was made by the Legislature in this regard. Art. 398, C. P. (La.), then read as follows:

"If the opposition has for its object to set aside the order of seizure, as having been effected on property not belonging to the one against whom the order was directed, but owned, on the contrary, by the third person making the opposition, it must be done by means of a petition, which, together with the citation, must be served on the party making the seizure, as in ordinary suits, but such opposition shall be considered as a separate demand, distinct from the suit in which the order was granted."

By Act 46, approved July 21st, 1886, the General Assembly re enacted, *in totidem verbis*, the Article above quoted, adding thereto this proviso:

"Provided, that in all cases where personal property is seized upon *mesne* or final process, and is claimed by a third op-

ponent, the seizing creditor may be allowed, in his answer to the third opposition, to allege and prove his title fraudulent, and the Court shall try and decide the issue thus made."

Thus the revocatory action allowed by the Civil Code of Louisiana, and which, prior to 1886, could only be instituted by what was known as the "direct action," can now, as was done in the instant case, be instituted by "answer" to the third opposition and intervention. The Court's attention is called to this fact to avoid any impression that might otherwise obtain, that the action of The H. B. Claflin Co. against Shwartz & Sons is not the revocatory action proper, by reason of it not being a direct action by The Claflin Co. against Shwartz & Sons.

We respectfully submit that in no view of this question can the writ of attachment be dissolved by reason of the cession, but, on the contrary, should be maintained and enforced.

And, we ask that the supervisory jurisdiction of this Honorable Court be exercised, in manner and form as prayed in our petition on file.

HENRY L. LAZARUS,
E. B. KRUTTSCHNITT,
Attorneys for Petitioner.

LAW ASSOCIATION
OF
PHILADELPHIA

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No.

ON THE PETITION OF THE H. B. CLAFLIN CO., ASKING FOR A *Certiorari* IN THE CASE OF SHWARTZ VERSUS THE H. B. CLAFLIN CO., NO. 159, OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF A. SHWARTZ & SONS ET ALS., IN OPPOSITION TO THE ABOVE APPLICATION.

It is respectfully submitted, that the application for the *certiorari* in this matter should be denied.

In presenting the following points, the references are chiefly to the printed transcript as it stood in the United States Circuit Court of Appeals for the Fifth Circuit in the case of A. Shwartz & Sons et als. versus the H. B. Claflin Co., and H. Kern & Son et als. versus the Same, No. 159 of the docket of that Court. It is presumed that this transcript will be furnished by the Claflin Co. and examined by this Court. A copy is herewith filed.

I.

The H. B. Claflin Co., in its petition for *certiorari*, makes a number of allegations which might well be called scandalous, and might probably be stricken out on proper motion, if it were worth the while to present such a motion. It is only necessary to say that there is not in the record a scintilla of either pleading or proof of any fraud, combination or conspiracy, on the part of A. Shwartz & Sons, or the members of that firm, whom we here represent. The firm of A. Shwartz & Sons are just as honorable and respectable merchants as the H. B. Claflin Co., and they do not propose to trespass on the patience of this high tribunal by going outside of the record. There is neither allegation, nor evidence in the record, which can cast the slightest cloud on their character, and we take it that your Honors will proceed upon the record.

The printed transcript in the United States Court of Appeals contains all that was properly before that Court. It will be seen by reference to the plaintiff's original petition, at page 3 of the transcript, that reference is made to the *sale* of a stock of merchandise to the firm of A. Shwartz & Sons, and these vendees were made garnishees with reference to the *price;* but there is not any allegation of any fraudulent purpose, or act, on the part of A. Shwartz & Sons. The stock of goods which had been sold and delivered to A. Shwartz &

Sons having been seized under the attachment, the H. B. Claflin Co. thus apparently claiming both the stock of goods and its price, A. Shwartz & Sons intervened by a petition, which will be found at page 12 of that transcript. In the answer of the H. B. Claflin Co. to this intervention, found at pages 19 and 20 of that transcript, the H. B. Claflin Co. make a general denial, specially denying that the property attached was in the possession of the intervenors at the time the writ was levied, and aver, that the property at that time belonged to the bankrupts, H. Kern & Son, and as such was liable for their debts, including the debt due the H. B. Claflin Co. This was all the issue.

So much for the pleadings. If we go into the facts as found by the Circuit Court of the United States, and which form the basis of opinion of the United States Court of Appeals for the Fifth Circuit, it will be found that they consist of several statements connected together by reference. The first is the opinion delivered by the Circuit Court of the United States, December 17, 1892, and found at pages 61 to 67 of the printed transcript in the United States Circuit Court of Appeals. By reference to page 63 of that transcript it will be seen that the proceedings in the State Insolvent Court were made a part of that opinion. Those, in turn, will be found in the printed transcript from pages 42 to 59, inclusive, the

order of December 8, 1892, accepting the cession by H. Kern & Son of their property in the State Court, being found at pages 44 and 45 of that transcript. The final opinion of the Circuit Court, the findings of fact and the conclusions of law are found at pages 88 to 97 of that printed transcript, and it will be observed that, at page 93, the Court adopts as part of its findings the aforesaid opinion of December 17, 1892. At pages 90 and 102 of that transcript there appears some additional findings of fact, made at the request of the H. B. Claflin Co., but made irregularly after the term had expired.

Now, these findings of fact of the Circuit Court will be searched in vain for any evidence of any impropriety on the part of A. Shwartz & Sons. Their position in this case is a perfectly simple one. By reference to pages 95 and 96 it will be seen that their store, on the corner of Bourbon and Canal streets, in the City of New Orleans, was burned on the 17th February, 1892, and they were seeking for another store and stock of goods to continue their business and to employ their clerks. It was manifestly a case of emergency when a dry goods business should not be allowed to perish and its clerks to be scattered, if another stock of goods and another store could be obtained. Kern & Son had another store and a stock of goods. They had applied for and obtained a respite

under the laws of Louisiana. The effects of this was to leave them in the possession of their property with the power to sell it.

Sumner vs. Dunbar, 12 An. 182.

Anderson vs. His Creditors, 33 An. 1155.

In the latter case the Court said:

"There is no affinity between the respite and surrender laws; they differ essentially. The former rests on the apparent solvency, the latter on the conceded insolvency of the debtor. In the first case the property remains *in the possession and absolute ownership* of the applicant; in the latter, it passes, with qualifications, to the creditors."

By Saturday evening, February 20, 1892, negotiations for the purchase of this stock of goods by A. Shwartz & Sons, and of the lease of the building in which Kern & Son were carrying on their trade, were completed, and the agreement of sale was made, which is found at pages 88 to 90 of the printed transcript. Under the 8th clause of this agreement, as we understand it, A. Shwartz & Sons were to enter into *immediate* possession of the stock of merchandise; and were also to be permitted to dispose of the same, as they might deem best, after certain entries should have been made, as provided in the 6th article. However this may be, A. Shwartz & Sons then paid over the sum of $40,000 by their check, and the work of

inventorying the goods began on Sunday morning. On Sunday evening, February 21, 1892, the keys of the former store of H. Kern & Son were delivered to the intervenors, A. Shwartz & Sons, who opened the store with them on Monday morning, February 22d. (Transcript, page 92). Sunday was a legal holiday, and Monday, the 22d February, was a State legal holiday, so that the checks could not be presented by Kern & Son to the bank on which they were drawn, until after the 22d of February (page 95). On the afternoon of February 22, 1892, the attachment which had been sued out in the Circuit Court was levied by the United States Marshal on this stock of goods. The Circuit Court correctly found as matter of fact that there was a *delivery* of the stock of goods by H. Kern & Son to A. Shwartz & Sons on the Sunday evening prior to the attachment, by the delivery of the keys; and by the taking possession on the part of A. Shwartz & Sons of the store and the stock of goods. The Circuit Court declares (page 93) "there had been a delivery, symbolical and actual, and $40,000 had been given in checks as the estimated price, which was to be ascertained by measuring and counting, and the price increased, or diminished, and paid, or returned accordingly." The Court further declared: "that the case was substantially that of Shuff vs. Morgan, 9 Martin (Old Series, page 592)."

And the H. B. Claflin Co. took no writ of error, and assigned no error as to this, or any other ruling of the lower court.

A. Shwartz & Sons having bought the store and stock of goods, and taken actual possession of it, and having paid out the sum of $40,000, in their checks, found themselves in a dangerous predicament. The Marshal had seized the goods themselves under an attachment, and the vendees were also garnisheed for the price. It was but natural that A. Shwartz & Sons should look to their vendors for some protection. The law of Louisiana is very strong upon the subject of warranty. Warranty is of the nature of every sale in Louisiana; that is to say, it exists without any special mention, unless it is expressly excluded. (Civil Code of 1870, Arts. 2475, 2476, 2501).

It was only honest and proper that, in such an emergency, H. Kern & Son should hold this price which they had received, or have it held, to abide the result of the controversy, and to protect their vendees. H. Kern & Son therefore took $37,500 of the money which they had thus received, and which was their money, and deposited it with trustees to protect A. Shwartz & Sons in the premises. Various payments were made out of these funds, and at the time of the decision of the case by the Circuit Court the sum of $18,964.08 remained in the hands of the final

trustee to protect A. Shwartz & Sons, in warranty. The Judge of the Circuit Court, in his opinion, expressed certain views in regard to this matter (pages 92 to 95), which were not maintained, however, by the United States Circuit Court of Appeals; but whatever were the views of the Circuit Court, the H. B. Claflin Co. took no writ of error and assigned no error.

In view of the foregoing, it will be seen how utterly gratuitous and unfounded are the aspersions addressed to this Honorable Court, in the petition for a *certiorari*, respecting the methods and conduct of A. Shwartz & Sons.

II.

Reference may now be made to the printed transcript of the case in the United States Circuit Court of Appeals, so far as the question of the attachment is concerned, and the effect upon it of the cession made in insolvency in the State Court by H. Kern & Son, December, 1892. It will seen by the dates that this was about 10 months after the sale. The respite which had been granted to H. Kern & Son by their creditors had not been a success, and it became their duty to go into insolvency. The certified copy of the proceedings in the State Court, as already shown, forms part of the opinion and findings of the Circuit Court. The order accepting the cession and staying all judicial proceedings against the per-

sons and property of H. Kern & Son is found at pages 44 and 45. Not only is it thus found in the record as part of the opinion and findings of the Court, but the H. B. Claflin Co. itself, in an exception found at page 40 of the printed transcript, filed December 10, 1892, annexed and made part of that exception, and of the record, the decree of the Supreme Court of Louisiana, in which the facts and dates of the cession are set forth. The opinion of the Supreme Court of Louisiana is found at printed pages 72 to 78, and the date of the cession is given at page 73. These proceedings in insolvency were pleaded by H. Kern & Son., manifestly for the protection of all their creditors, by the motion and suggestion presented March 3, 1893 (transcript, pages 97, 98). The question of the right to file this document was taken under advisement by the Court and leave to file was granted prior to the signing of the judgment (page 98).

The question of the insolvency and the cession was also brought to the attention of the Court by A. Shwartz & Sons, intervenors, by the motion found at printed page 33, December 6, 1892, and the supplemental motion on December 10, 1892, found at page 42, and also by supplemental motion, as intervenors and garnishees, filed January 9, 1893, found at page 70. The insolvency was also pleaded by Victor

Mauberret, Civil Sheriff of the Parish of Orleans, and provisional syndic of H. & Emile Kern, insolvents, by motion found at pages 34 and 35, and although Mauberret was afterwards removed from office, the fact remains that he was provisional syndic at the time he made that motion.

But beyond all this, the Judge of the Circuit Court, in his findings of fact and of law (pages 88 to 97), which adopted and included his opinion found at pages 61 to 69, and the certified transcript of the cession itself found at pages 42 to 59, finds and declares that this cession by H. Kern & Son took place on the 8th December, 1892, and finds, as a matter of law, that the attachment was stayed and dissolved, and perished on that date; and the H. B. Claflin Co. *never took any writ of error, and never assigned any error upon these questions.*

III.

The Judge of the Circuit Court having thus found the fact of the cession of December 8, 1892, and its effect as a matter of law on the attachment erroneously and by inadvertence, as the Circuit Court of Appeals declares in its opinion, proceeded to decree, p. 97, "that the agreement (of sale) of February 20, 1892, herein, did not transfer to the intervenors, A. Shwartz & Sons, the property attached, so as to affect the rights of the

plaintiff as attaching creditors of the defendants herein."

The lower court also gave an erroneous judgment against H. Kern & Sons and "the heirs of Emile Kern *in solido*," as pointed out by the Circuit Court of Appeals.

It was, of course, a manifest error, for the lower court, after finding the fact of the cession, and that the attachment had thereby perished on the 8th of December, 1892, to decree on the 22d of April, 1893, that the attaching creditors could have any rights or claims thereunder.

The fact remains, however, that the attaching plaintiff, the H. B. Claflin Co., never assigned any error and never took any writ of error with respect to the question of the cession or the effect of it, nor upon any other question in the cause.

We beg to inquire, therefore, what is the petitioner, the H. B. Claflin Co., doing here asking for a *certiorari?*

The Court of *first instance* decided squarely that the cession took place Dec. 8, 1892, and that its effect under the Act of Congress, Rev. Stat. §933, was to dissolve the attachment, pp. 65, 66, and the Judge referred back to the original Act of Congress of 1848, 9 Stat. p. 213, as showing the intent of Congress beyond a doubt. And at p. 95 of the transcript, the

Court of first instance repeated, as a conclusion of law, its finding as follows:

"1st. That the attachment was dissolved by the insolvency proceedings in which the defendants made, and the proper court accepted, a surrender of all their property."

The Claflin Co. having assigned no error and taken no writ of error as to this or any other question, but having taken their chances in the appellate tribunal, cannot, it seems to us, upon any legal principle, with which we are familiar, now ask this tribunal to review this, or any other question in the cause, which is in similar condition.

IV.

The theory of the petition for a *certiorari*, that A. Shwartz & Sons, the intervenors, had no right to raise the question of *the effect of the cession on the attachment*, is curiously incorrect.

The Circuit Court entertained their application, as well as that of the defendants, Kern & Son, and their Provisional Syndic, and found and declared that the attachment was dissolved by the cession of Dec. 8, 1892, and the Claflin Co. took no writ of error and assigned no error. But if it had, the result must have been the same. Why should not the intervenors say: "You have seized our property by a writ, and

the writ has perished, pending a dispute as to the title."

The statement in the petition of the H. B. Claflin & Co. for a *certiorari*, that A. Shwartz & Sons, the intervenors in the Court in the first instance, were present at the trial of the motion of defendants to dissolve the attachment in March and April, 1892, and in furtherance of a "combination and conspiracy," were assisting Kern & Son in this rule, is highly erroneous, and is also irrelevant, to say the least. The record of this matter is found at pp. 19 and 22 to 28 of the transcript, as printed in the U. S. Circuit Court of Appeals, and it will there appear that the intervenors and their counsel did not appear at all in that proceeding. A motion for a new trial of the motion was urged by defendants, but finally refused. See printed page 35.

The further allegation of the H. B. Claflin Co., in its petition here for a *certiorari*, that Kern & Son then went into insolvency (Dec. 8, 1892), and made a surrender, at the instigation of A. Shwartz & Sons, is equally baseless. There is no truth in it, nor any excuse in the record for making it.

The intimation in the petition of the Claflin Co. for *certiorari*, that the intervenors, in assigning error, admitted that the judgment of the lower court did not dissolve the attachment, is entirely erroneous and cal-

culated to mislead. The rule in Louisiana is, that where a final judgment does not maintain a conservatory writ, it denies it. Succession of Caldwell, 8 An. 42; Nicholson vs. Bank, 27 An. 370; Nalle vs. Baird, 30 An. 1148; Succession of Anderson, 33 An. 583; Villars vs. Fauré, 36 An. 398; Shakespeare vs. Ware, 38 An. 574.

Our 6th assignment of error shows simply that the Court having found the attachment was dissolved, as we claimed, should have formally decreed the fact—to the end that there might be be no further dispute. Transcript, p. 104.

V.

But let it be supposed that there is no force in the foregoing suggestions, what merits has the application of the Claflin Co. for a *certiorari?*

We may pass over the allegations of fraud, which are in the nature of Chinese warfare, in which the greatest soldier is the one who can make the most hideous faces, and we may also pass over the many other irrelevant statements in the petition, and come to the main point.

The Circuit Court found that the attachment perished on the 8th December, 1892. The error committed by the lower Judge, after making this finding, has already been pointed out. Both A. Shwartz & Sons and H. Kern & Son, and Mr. and Mrs. Henry Kern took

writs of error to the U. S. Circuit Court of Appeals, and that Court agreeing, with the lower Judge, that the attachment had perished on the 8th of December, 1892, corrected, as to A. Shwartz & Sons, the error of the lower Judge as to the effect of that fact. The Circuit Court of Appeals delivered a full opinion through Judge Pardee as its organ, and the conclusions arrived at are very simple and certain.

(1) As to Kern & Son it is pointed out that the judgment of the Circuit Court was erroneous and must be reversed for the grave mistakes made in the attempt to bring in certain parties after the death of Emile Kern, *pendente lite.*

(2) As to A. Shwartz & Sons, it was found that, while the Judge of the Circuit Court was right in holding that the attachment perished on the 8th December, 1892 (a decision of which the Claflin Co. had not complained), yet that he was wrong in omitting to carry the conclusion into the judgment so as to make it effective. "This omission," said the Appellate Court, "was inadvertent, and should be corrected in the judgment given in this Court. The attachment dissolved, the Court had neither interest nor jurisdiction to inquire into the ownership of the property attached." And thereupon the judgment was reversed and the cause *remanded,* for certain further proceedings, as the opinion shows.

The present object of the Claflin Co., enveloped in a cloud of allegations, many of which, as we have pointed out, are unfounded and improper, is to induce your Honors to take up and discuss again the long-settled question as to the effect on an attachment in the Federal Court in Louisiana of a cession in the State insolvent court. There are some things that may be considered as definitely determined, and this, we submit, is one of them.

Apart from the striking fact that the Claflin Co. did not complain of the decision of the court of first instance, but took its chances as defendant in error in the Circuit Court of Appeals, it is manifest, as we think, that the decisions cited in the opinion of Judge Pardee make an end of controversy.

We understand that the Act of Congress creating Courts of Appeal was intended to relieve the docket of this Honorable Court and not to load it down. We understand that a writ of *certiorari* is only to be granted in cases which are made final in the Circuit Courts of Appeals, and not where, as here, that tribunal has sent the case back to the Court of first instance. Railway vs. Osborne, 146 U. S. 354. And the power is to be exercised "sparingly and with great caution and only in cases of peculiar gravity and to

secure uniformity of decision." Construction Co. vs. Railway, 148 U. S. 383.

There are none of the required elements present in this matter. The decisions in Tua vs. Carriere, 117 U. S. 201, and Geilinger vs. Phillippi, 133 U. S., 246, 257, confirm the views expressed as elementary in Lafollye vs. Carriere, 24 Fed. Rep. 346.

It is respectfully submitted that the writ should be denied.

WILLIAM WIRT HOWE,
For A. Shwartz & Sons.